A
A
0
0
8
1
9
2
0
6
4

UC SOUTHERN REGIONAL LIBRARY FACILITY

UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

A SELECTION OF CASES
ON THE
LAW OF INSURANCE

BY

EDWIN H. WOODRUFF

PROFESSOR OF LAW IN THE COLLEGE OF LAW
CORNELL UNIVERSITY

NEW YORK
BAKER, VOORHIS & COMPANY
1914

COPYRIGHT, 1900
By EDWIN H. WOODRUFF

May 10 - 7-60

TABLE OF CONTENTS.

PART I.

NATURE OF THE CONTRACT.

I. FIRE INSURANCE.	1
II. MARINE INSURANCE.....	5
III. LIFE INSURANCE.	7
IV. MUTUAL BENEFIT INSURANCE.....	13
V. ACCIDENT INSURANCE	15
VI. FIDELITY AND GUARANTY INSURANCE.....	16

PART II.

FORMATION OF THE CONTRACT.

I. PARTIES	22
<i>a.</i> Infants.....	22
<i>b.</i> Corporations.....	31
II INSURABLE INTEREST.....	38
<i>a.</i> In property.....	38
<i>b.</i> In life.....	50
1. In one's own life.. ..	50
2. In the life of another.....	53
Relationship.....	53
Debtor and creditor.....	60
<i>c.</i> Reinsurance.. ..	71
III. FORM OF THE CONTRACT.....	76
<i>a.</i> Oral or written.....	76
<i>b.</i> The standard policy.....	81
IV. CONSIDERATION.....	92
V. CONSUMMATION OF THE CONTRACT.....	93
VI. REALITY OF CONSENT	104
<i>a.</i> Concealment	104
<i>b.</i> Representations and warranties.....	108
1. In general.	108

2. Promissory representations.....	118
3. Statutory enactments.....	120
4. Effect of misrepresentation.....	123
5. Burden of proof.....	124
<i>c.</i> Mistake.....	126
VII. ILLEGALITY.....	126

PART III.

CONSTRUCTION OF THE CONTRACT.

I. IN GENERAL.....	131
--------------------	-----

PART IV.

TERMS OF THE CONTRACT.

I. IN GENERAL.....	135
<i>a.</i> Warranties.....	135
<i>b.</i> Premiums.....	135
II. TERMS OF THE FIRE INSURANCE CONTRACT.....	142
<i>a.</i> Respecting matters before loss.....	142
1. Increase of hazard.....	142
2. Other insurance.....	146
3. Over-valuation.....	150
4. Ownership.....	152
5. Alienation.....	155
6. Incumbrances.....	158
7. Prohibited articles.....	162
8. Occupancy.....	165
9. Location of property.....	170
10. Operation of manufactory.....	172
11. Alterations.....	173
12. Structure on ground not owned by insured.....	176
13. Foreclosure proceedings.....	176
<i>b.</i> Loss by fire; proximate cause.....	178
1. In general.....	178
Negligence.....	181
Explosion.....	182
Falling building.....	184
Lighting.....	184
Removal for safety.....	184
<i>c.</i> Respecting matters after loss.....	185
1. Proofs of loss.....	185
2. Magistrate's certificate.....	188

3. Examination of insured.....	190
4. Safe clause	192
5. Arbitration.....	194
6. Pro-rating and contribution.....	198
7. Option to rebuild	203
8. Divisibility of loss	205
9. Valued policies	207
10. Limitation of time to sue	211
III. TERMS OF THE MARINE INSURANCE CONTRACT	217
1. Attachment of the risk.....	217
2. Termination of the risk	219
3. Deviation.	220
4. Seaworthiness	221
5. Perils insured against	228
6. General average.....	232
7. Total loss and abandonment.....	236
8. Particular average and the memorandum clause.....	241
9. Sue and labor clause.....	245
IV. TERMS OF THE LIFE INSURANCE CONTRACT	248
1. Age	248
2. Health	249
Medical attendant	254
Heredity	255
Intoxicants	256
3. Occupation	256
4. Other insurance.....	256
5. Military or naval service	256
6. Residence and travel	256
7. Suicide	258
8. Poison	263
9. Violation of law	263
10. Incontestability	264
11. Non-forfeiture	268
V. TERMS OF THE ACCIDENT INSURANCE CONTRACT.....	270
1. What is an accident	270
2. External injury	277
3. Proximate cause.....	282
4. Voluntary exposure.....	284
5. Poison	287
6. Inhaling gas	290
7. Over-exertion	294
8. Intoxicants	295
9. Occupation	299

10. Violation of law	301
11. Total disability	310
12. When liability fixed	314
13. Burden of proof	315
VI. TERMS OF THE MUTUAL BENEFIT INSURANCE CONTRACT....	318
1. In general	318
2. Where the terms are to be found....	318
3. Change of terms,	321
VII. TERMS OF FIDELITY AND GUARANTY INSURANCE CONTRACT.	323
1. In general	323
2. Fidelity insurance ...	323
3. Title guaranty insurance	329

PART V.

LIMITS OF THE CONTRACTUAL OBLIGATION.

I. BENEFICIARIES.....	336
<i>a.</i> Fire insurance.....	336
1. In general.....	336
2. Vendor and vendee.....	344
3. Mortgagor and mortgagee.....	349
<i>b.</i> Life insurance,	359
1. Who may be a beneficiary.....	359
2. Nature of the beneficiary's interest.....	362
<i>c.</i> Mutual benefit insurance.....	381
II. ASSIGNMENT.....	389
<i>a.</i> Fire insurance.....	389
<i>b.</i> Marine insurance.....	401
<i>c.</i> Life insurance.....	402

PART VI.

BREACH OF CONTRACT BY THE INSURER.

I. REMEDIES.....	410
II. MEASURE OF DAMAGES.....	414

PART VII.

WAIVER AND ESTOPPEL.

I. IN GENERAL, ...	417
II. BEFORE THE POLICY IS ISSUED.....	423

III. AFTER THE POLICY IS ISSUED, BUT BEFORE FORFEITURE....	443
IV. AFTER FORFEITURE.....	444
V. WHAT CONSTITUTES WAIVER.....	459

PART VIII.

INSURANCE AGENTS.

I. SCOPE OF AUTHORITY.....	468
1. Local agents.....	468
2. Broker.....	500
3. Adjuster.....	501
4. Sub-agents.....	503
5. Oral waiver.....	512
II. AGENT OF INSURED OR INSURER?.....	517
III. DUTY TO PRINCIPAL.....	532

PART IX.

SUBROGATION.

I. FIRE INSURANCE.....	536
1. In general.....	536
2. Tort.....	550
3. Carriers.....	553
4. Lessor and lessee.....	560
5. Mortgagor and mortgagee — lienholder.....	566
6. Procedure.....	581
II. LIFE AND ACCIDENT INSURANCE.....	585

TABLE OF CASES.

* * Where *n* is prefixed to the page number, the case is, at that page, digested or referred to in a note.

	PAGE.		PAGE.
Accident Ins. Co. <i>v.</i> Crandal	<i>n.</i> 278	Bradlie <i>v.</i> Ins. Co.	236
Ætna Life Ins. Co. <i>v.</i> Davey	<i>n.</i> 297	Briggs <i>v.</i> Ins. Co.	183
Ætna Life Ins. Co. <i>v.</i> France	50, 248	Brown <i>v.</i> Ins. Co.	<i>n.</i> 232
Ætna Live Stock Ins. Co. <i>v.</i> Olmstead	<i>n.</i> 521	Bruce <i>v.</i> Ins. Co.	<i>n.</i> 270
Aitchison <i>v.</i> Lohre	245	Bumstead <i>v.</i> Ins. Co.	185
Alexander <i>v.</i> Ins. Co.	443	Burgess <i>v.</i> Ins. Co.	220
Allen <i>v.</i> Ins. Co.	<i>n.</i> 526	Burkhard <i>v.</i> Ins. Co.	284
Amer. Cent. Ins. Co. <i>v.</i> Rothchild	<i>n.</i> 172	Burkheiser <i>v.</i> Assoc.	<i>n.</i> 315
Amer. Fire Ins. Co. <i>v.</i> Manuf'g Co.	<i>n.</i> 173	Burleigh <i>v.</i> Ins. Co.	<i>n.</i> 133
Amer. Ins. Co. <i>v.</i> Padfield	<i>n.</i> 170	Burritt <i>v.</i> Ins. Co.	105
Amer. Steam-Boiler Ins. Co. <i>v.</i> Anderson	532	Cammack <i>v.</i> Lewis	<i>n.</i> 66, <i>n.</i> 407
Amicable Soc. <i>v.</i> Bolland	<i>n.</i> 307	Campbell <i>v.</i> Ins. Co.	76
Amer. Surety Co. <i>v.</i> Pauly	<i>n.</i> 328	Carpenter <i>v.</i> Ins. Co. (Ia.)	<i>n.</i> 140
Antcl <i>v.</i> Ins. Co.	<i>n.</i> 59, <i>n.</i> 264	Carpenter <i>v.</i> Ins. Co. (N. Y.)	<i>n.</i> 188
Arff <i>v.</i> Ins. Co.	503	Castellain <i>v.</i> Preston	536, <i>n.</i> 349
Arkansas F. Ins. Co. <i>v.</i> Wilson	<i>n.</i> 157	Central Bank <i>v.</i> Hume	<i>n.</i> 379
Babcock <i>v.</i> Ins. Co.	184	Central City Ins. Co. <i>v.</i> Oates	459
Bacon <i>v.</i> Acc. Assoc.	<i>n.</i> 277	Chambers <i>v.</i> Ins. Co.	124
Baley <i>v.</i> Ins. Co.	158	Chicago M. L. A. <i>v.</i> Hunt	<i>n.</i> 31
Barney <i>v.</i> Dudley	414	Clafin <i>v.</i> Ins. Co.	<i>n.</i> 191
Baron <i>v.</i> Brummer	<i>n.</i> 406	Clark <i>v.</i> Mobile	<i>n.</i> 39
Benham <i>v.</i> Assur. Co.	<i>n.</i> 120	Clay Ins. Co. <i>v.</i> Huron Co.	<i>n.</i> 154
Bernard <i>v.</i> Ins. Co.	<i>n.</i> 526	Clyburn <i>v.</i> Reynolds	<i>n.</i> 46
Berwind <i>v.</i> Ins. Co.	227	Commonwealth <i>v.</i> Vrooman	<i>n.</i> 37
Blackburn <i>v.</i> Vigors	<i>n.</i> 107	Commonwealth <i>v.</i> Wetherbee	13
Blairmore Co. <i>v.</i> Macredie	<i>n.</i> 240	Conn. Fire Ins. Co. <i>v.</i> Erie R'y	550
Bloom <i>v.</i> Ins. Co.	307, <i>n.</i> 306	Conn. Fire Ins. Co. <i>v.</i> Ins. Co.	<i>n.</i> 203
Bloomington M. B. Assoc. <i>v.</i> Blue	<i>n.</i> 361	Conn. Life Ins. Co. <i>v.</i> Akens	<i>n.</i> 263
Boatmen's Ins. Co. <i>v.</i> Parker	183	Conn. Life Ins. Co. <i>v.</i> Luchs	60
Bowman <i>v.</i> Ins. Co.	<i>n.</i> 158	Conn. Life Ins. Co. <i>v.</i> Schaefer	59, <i>n.</i> 14
Bradbury <i>v.</i> Ins. Assoc.	170	Continental L. Ins. Co. <i>v.</i> Rogers	<i>n.</i> 118
Bradley <i>v.</i> Ins. Co.	<i>n.</i> 309	Cooper <i>v.</i> Ben. Assoc.	314
		Cooper <i>v.</i> Schaeffer	69
		Corson, Appeal of	63
		Cornwell <i>v.</i> Assoc.	<i>n.</i> 287, <i>n.</i> 306
		Cowles <i>v.</i> Ins. Co.	<i>n.</i> 271

	PAGE.		PAGE.
Creed <i>v.</i> Sun Fire Office	38	Gibb <i>v.</i> Ins. Co.	<i>n.</i> 157
Critchett <i>v.</i> Ins. Co.	492	Gilligin <i>v.</i> Ins. Co.	<i>n.</i> 190
Cronin <i>v.</i> Ins. Co.	56	Glenn <i>v.</i> Burns	372
Cushman <i>v.</i> Ins. Co., <i>n.</i> 151, <i>n.</i> 209, <i>n.</i> 212		Globe Mut. Ben. Assoc., Matter of	28
Dalby <i>v.</i> Life Assur. Co.	7, <i>n.</i> 59	Goetzman <i>v.</i> Ins. Co.	<i>n.</i> 306
Darrell <i>v.</i> Tibbitts	560	Goodrich & Hick's Appeal	71
Darrow <i>v.</i> Soc.	<i>n.</i> 397	Gore <i>v.</i> Assur. Co.	510
Davis <i>v.</i> Furniture Co.	<i>n.</i> 154	Gove <i>v.</i> Ins. Co.	181
Davis <i>v.</i> Ins. Co.	<i>n.</i> 145	Gracie <i>v.</i> Ins. Co.	<i>n.</i> 220
De Lancey <i>v.</i> Ins. Co.	<i>n.</i> 133	Grattan <i>v.</i> Ins. Co.	<i>n.</i> 300
Dolan <i>v.</i> Assoc.	<i>n.</i> 249	Gray <i>v.</i> Ins. Co.	433
Dowd <i>v.</i> Ins. Co.	176	Green <i>v.</i> Ins. Co.	<i>n.</i> 160
Dryer <i>v.</i> Ins. Co.	479	Gresham <i>v.</i> Ins. Co.	<i>n.</i> 306
Duran <i>v.</i> Ins. Co.	<i>n.</i> 306	Griffey <i>v.</i> Ins. Co.	<i>n.</i> 188
Dwight <i>v.</i> Ins. Co.	<i>n.</i> 300	Griffin <i>v.</i> Assoc.	<i>n.</i> 300
Eadie <i>v.</i> Slimmon	<i>n.</i> 406	Grosvenor <i>v.</i> Ins. Co.	349
Earley <i>v.</i> Ins. Co.	<i>n.</i> 289	Guardian Ins. Co. <i>v.</i> Hogan	<i>n.</i> 59
Eastman <i>v.</i> Assoc.	318	Hall <i>v.</i> Ins. Co.	389
Emerick <i>v.</i> Coakley	<i>n.</i> 406	Hamilton <i>v.</i> Ins. Co.	194
Employers' Liability Co. <i>v.</i> Merrill	15	Hammel <i>v.</i> Ins. Co.	<i>n.</i> 157
Equitable Acc. Co. <i>v.</i> Osborn	<i>n.</i> 286	Hann <i>v.</i> Nat. Union	<i>n.</i> 252
Erb <i>v.</i> Ins. Co.	126	Harding <i>v.</i> Townshend	<i>n.</i> 588
Ermentrout <i>v.</i> Ins. Co.	184, 487	Harley <i>v.</i> Heist	362
Evans <i>v.</i> Ins. Co.	256	Harris <i>v.</i> Ins. Co.	190
Exchange Bank <i>v.</i> Loh	<i>n.</i> 66, <i>n.</i> 71	Harris <i>v.</i> Fire Co.	<i>n.</i> 209
	<i>n.</i> 409	Harrison <i>v.</i> Pepper	44
Fayerweather <i>v.</i> Ins. Co.	557	Hart <i>v.</i> Ins. Co.	213
Fearn <i>v.</i> Ward	<i>n.</i> 93	Hartford Ins. Co. <i>v.</i> Davenport	<i>n.</i> 422
Ferguson <i>v.</i> Ins. Co.	<i>n.</i> 14	Hartman <i>v.</i> Ins. Co.	259
Fidelity & Casualty Co. <i>v.</i> Bank	<i>n.</i> 328	Hastings <i>v.</i> Ins. Co.	350
Fidelity & Casualty Co. <i>v.</i> Eickhoff	323	Hatch <i>v.</i> Ins. Co.	<i>n.</i> 130, <i>n.</i> 309
Fidelity & Casualty Co. <i>v.</i> Johnson	<i>n.</i> 278	Hathaway <i>v.</i> Ins. Co.	<i>n.</i> 257
Fillmore <i>v.</i> Knights	<i>n.</i> 199	Haughton <i>v.</i> Ins. Co.	217
Fire Ins. Co. <i>v.</i> Felrath	354	Havens <i>v.</i> Ins. Co.	<i>n.</i> 212
Fireman's Fund Ins. Co. <i>v.</i> Sholm	184	Hebert <i>v.</i> Ins. Co.	80
First Cong. Church <i>v.</i> Ins. Co.	<i>n.</i> 164	Heffron <i>v.</i> Ins. Co.	183
Foster <i>v.</i> Gile	371	Hellenberg <i>v.</i> Dist. No. 1.	<i>n.</i> 321,
Fox <i>v.</i> Assoc.	197		<i>n.</i> 322
Franklin Fire Ins. Co. <i>v.</i> Martin	435	Hermann <i>v.</i> Ins. Co.	165
	<i>n.</i> 428	Hicks <i>v.</i> Assur. Co. (N. Y.)	81
Freeman <i>v.</i> Acc. Assoc.	282	Hicks <i>v.</i> Ins. Co. (Ia.)	158
Gans. <i>v.</i> Ins. Co.	<i>n.</i> 522	Hitchcock <i>v.</i> Ins. Co.	<i>n.</i> 401
Georgia Home Ins. Co. <i>v.</i> Allen	192	Hoffman <i>v.</i> Ins. Co.	<i>n.</i> 140
German Ins. Co. <i>v.</i> Eddy	<i>n.</i> 197, <i>n.</i> 212	Holdom <i>v.</i> A. O. U. W.	<i>n.</i> 381
German Am. Ins. Co. <i>v.</i> Humphrey		Holman <i>v.</i> Ins. Co.	<i>n.</i> 271
	<i>n.</i> 162	Home Ins. Co. <i>v.</i> Hammang	<i>n.</i> 190
		Home Ins. Co. <i>v.</i> Myer	126
		Home Mut. Ins. Co. <i>v.</i> O. R. & N. Co.	581

	PAGE.		PAGE.
Honore <i>v.</i> Ins. Co.	566	Lucas <i>v.</i> Ins. Co.	198
Huck <i>v.</i> Ins. Co.	184	Lynn Gas & Elec. Co. <i>v.</i> Ins. Co.	178
Illinois Mut. F. Ins. Co. <i>v.</i> Andes Co.	<i>n.</i> 76	McAllister <i>v.</i> Ins. Co.	140
Illinois Mut. F. Ins. Co. <i>v.</i> Fix	396	M'Carty <i>v.</i> Blevins	<i>n.</i> 381
Imperial Fire Ins. Co. <i>v.</i> Coos Co.	<i>n.</i> 175	McGlinchey <i>v.</i> Fidelity Co.	277
Imperial Fire Ins. Co. <i>v.</i> Dunham	152	McGlother <i>v.</i> Ins. Co.	<i>n.</i> 289
Insurance Co. <i>v.</i> Bachler	<i>n.</i> 197	McGowan <i>v.</i> Ins. Co.	205
Insurance Co. <i>v.</i> Bennett	<i>n.</i> 278	McNally <i>v.</i> Ins. Co.	<i>n.</i> 130
Insurance Co. <i>v.</i> Boon	<i>n.</i> 181	McQueeney <i>v.</i> Ins. Co.	<i>n.</i> 207
Insurance Co. <i>v.</i> Brame	585	Mack <i>v.</i> Ins. Co.	173
Insurance Co. <i>v.</i> Butler	207	Maine Ben. Assoc. <i>v.</i> Parks	249
Insurance Co. <i>v.</i> Crunk	184	Mair <i>v.</i> Ins. Co.	<i>n.</i> 299
Insurance Co. <i>v.</i> Fogarty	241	Manufacturer's Ins. Co. <i>v.</i> Zeitinger	<i>n.</i> 188
Insurance Co. <i>v.</i> Gridley	255	Markey <i>v.</i> Ins. Co.	93
Insurance Co. <i>v.</i> Leslie	<i>n.</i> 211	Marvin <i>v.</i> Ins. Co.	<i>n.</i> 517
Insurance Co. <i>v.</i> Stinson	576	Mayo <i>v.</i> Ins. Co.	<i>n.</i> 245
Insurance Co. <i>v.</i> Updegraff	<i>n.</i> 348	Mechanics' Sav. Bank <i>v.</i> Guarantee Co.	<i>n.</i> 21
Insurance Co. <i>v.</i> Wilkinson	423	Merchants' & Miners' Co. <i>v.</i> Ins. Co.	232
Insurance Co. <i>v.</i> Wolff	482	Millaudon <i>v.</i> Ins. Co.	182
Jauvrin <i>v.</i> Ins. Co.	<i>n.</i> 145	Miller <i>v.</i> Aldrich	355
John R. Davis Co. <i>v.</i> Ins. Co.	500, <i>n.</i> 154	Miller <i>v.</i> Ins. Co. (Ia.)	113
Johnson <i>v.</i> Ins. Co. (Mich.)	<i>n.</i> 300	Miller <i>v.</i> Ins. Co. (Neb.)	<i>n.</i> 213
Johnson <i>v.</i> Ins. Co. (Minn.)	22	Millville Ins. Co. <i>v.</i> Assoc.	468
Kausal <i>v.</i> Ins. Co.	517	Minn. Title Ins. Co. <i>v.</i> Drexel	<i>n.</i> 333
Keeffe <i>v.</i> Soc.	<i>n.</i> 295	Mobile Co. <i>v.</i> Walker	<i>n.</i> 258
Keene <i>v.</i> Assoc.	<i>n.</i> 318	Moore <i>v.</i> Ins. Co. (N. H.)	<i>n.</i> 170
Kettenbach <i>v.</i> Assoc.	252, <i>n.</i> 118	Moore <i>v.</i> Ins. Co. (N. Y.)	<i>n.</i> 518
Kimball <i>v.</i> Ins. Co.	118, <i>n.</i> 123	Moulor <i>v.</i> Ins. Co.	253
King <i>v.</i> Ins. Co.	<i>n.</i> 574	Murray <i>v.</i> Ins. Co.	301
Klein <i>v.</i> Ins. Co.	<i>n.</i> 140	Nat. Masonic Assoc. <i>v.</i> Burr	<i>n.</i> 197
Kuapp <i>v.</i> Ins. Co.	268	Nelson <i>v.</i> Ins. Co. (Ia.)	254
Krumm <i>v.</i> Ins. Co.	<i>n.</i> 509	Nelson <i>v.</i> Ins. Co. (N. J.)	568
Kyte <i>v.</i> Assur. Co. (144 Mass.)	477	New Hamp. Ins. Co. <i>v.</i> Noyes	<i>n.</i> 28
Kyte <i>v.</i> Assur. Co. (149 Mass.)	142	New York Life Ins. Co. <i>v.</i> Fletcher	527, <i>n.</i> 428
Ladd <i>v.</i> Ins. Co.	<i>n.</i> 173	New York Life Ins. Co. <i>v.</i> Statham	135, <i>n.</i> 138, <i>n.</i> 140
Lamberton <i>v.</i> Ins. Co.	512	Newark Mach. Co. <i>v.</i> Ins. Co.	93
Lane <i>v.</i> Ins. Co.	188	Niagara Ins. Co. <i>v.</i> Foxhand	<i>n.</i> 191
Langdon <i>v.</i> Ins. Co.	359	Niagara Ins. Co. <i>v.</i> Scammon	<i>n.</i> 150
Lantz <i>v.</i> Ins. Co.	447	Nightingale <i>v.</i> Ins. Co.	<i>n.</i> 528
Laselle <i>v.</i> Ins. Co.	<i>n.</i> 170	Noel <i>v.</i> Ins. Co.	<i>n.</i> 126
Lebanon Ins. Co. <i>v.</i> Leathers	172	North Amer. Ins. Co. <i>v.</i> Burroughs	<i>n.</i> 300
Lipman <i>v.</i> Ins. Co.	100	North Brit. Ins. Co. <i>v.</i> Ins. Co.	<i>n.</i> 203
Loomis <i>v.</i> Ins. Co.	207		
Lovelace <i>v.</i> Assoc.	270		
Loy <i>v.</i> Ins. Co.	155		

	PAGE.		PAGE.
Northwestern Life Ins. Co. <i>v.</i> Bank		Rittler <i>v.</i> Smith	67
	<i>n.</i> 297	Robinson <i>v.</i> Ins. Co.	463
Norwich Fire Ins. Co. <i>v.</i> Boomer	357	Robinson <i>v.</i> Lodge	<i>n.</i> 198
Noyes <i>v.</i> Ins. Co.	<i>n.</i> 172	Rockford Ins. Co. <i>v.</i> Nelson	<i>n.</i> 125
Oakes <i>v.</i> Ins. Co.	444	Rohrbach <i>v.</i> Ins. Co.	<i>n.</i> 41
O'Farrell <i>v.</i> Ins. Co.	<i>n.</i> 526	Rustin <i>v.</i> Ins. Co.	294
Olmstead <i>v.</i> Keyes	<i>n.</i> 368	Ryan <i>v.</i> Rothweiler	368
Orient Ins. Co. <i>v.</i> Daggs	<i>n.</i> 211	Salisbury <i>v.</i> Ins. Co.	<i>n.</i> 79
Oshkosh Gas Co. <i>v.</i> Ins. Co.	209	Saveland <i>v.</i> Fidelity Co.	310
Parker <i>v.</i> Ins. Co.	<i>n.</i> 519	Scarth <i>v.</i> Soc.	<i>n.</i> 263
Patterson <i>v.</i> Ins. Co.	258, <i>n.</i> 307	Schunck <i>v.</i> Fond	<i>n.</i> 322
Paul <i>v.</i> Virginia	<i>n.</i> 39	Scottish Union Ins. Co. <i>v.</i> Dangaix	
Pellazzino <i>v.</i> Soc.	321		<i>n.</i> 535
Penn Mut. Fire Ins. Co. <i>v.</i> Schmidt		Scripture <i>v.</i> Ins. Co.	182
	<i>n.</i> 160	Sergeant <i>v.</i> Ins. Co.	<i>n.</i> 518
Penn Mut. Life Ins. Co. <i>v.</i> Bank	120	Shackelton <i>v.</i> Fire Office	<i>n.</i> 170
People <i>v.</i> Fire Assoc. of Phila.	<i>n.</i> 39	Shader <i>v.</i> Assur. Co.	297
People <i>v.</i> Rose	16	Shephard <i>v.</i> Ins. Co.	<i>n.</i> 157
People's Ins. Co. <i>v.</i> Pulver	<i>n.</i> 188	Singleton <i>v.</i> Ins. Co.	53
People's Street Ry. <i>v.</i> Spencer	341	Skudera <i>v.</i> Ins. Co.	410
Phenix Ins. Co. <i>v.</i> Bank	578	Smaldone <i>v.</i> Ins. Co.	501
Phenix Ins. Co. <i>v.</i> Holcombe	<i>n.</i> 157	Smith <i>v.</i> Ins. Co. (Ia.)	<i>n.</i> 160
Phoenix Ins. Co. <i>v.</i> Trans. Co.	553	Smith <i>v.</i> Ins. Co. (N. Y.)	150
Phoenix Life Ins. Co. <i>v.</i> Raddin	92, 108	Smith <i>v.</i> Soc.	<i>n.</i> 263
Pickett <i>v.</i> Ins. Co.	290	Sneed <i>v.</i> Ins. Co.	<i>n.</i> 194
Piedmont Co. <i>v.</i> Young	<i>n.</i> 133	State <i>v.</i> Ackerman	31
Pingrey <i>v.</i> Ins. Co.	<i>n.</i> 367, <i>n.</i> 381	State Ins. Co. <i>v.</i> Schreck	160
Powell <i>v.</i> Dewey	<i>n.</i> 63	Steinbach <i>v.</i> Ins. Co. (N. Y.)	<i>n.</i> 164
Powers <i>v.</i> Assoc.	<i>n.</i> 254	Steinbach <i>v.</i> Ins. Co. (U. S.)	<i>n.</i> 164
Powles <i>v.</i> Innes	5	Steinback <i>v.</i> Diepenbrock	402
Pratt <i>v.</i> Ins. Co.	<i>n.</i> 207	Sternaman <i>v.</i> Ins. Co.	<i>n.</i> 526
Price <i>v.</i> Ins. Co.	255	Stewart <i>v.</i> Ins. Co.	255
Proudfoot <i>v.</i> Montefiore	106	Stone <i>v.</i> Casualty Co.	300, <i>n.</i> 287
Pullis <i>v.</i> Robison	375	Supreme Commandery <i>v.</i> Ainsworth	
			<i>n.</i> 323
Quarles <i>v.</i> Clayton	336	Supreme Conclave <i>v.</i> Cappella	381
Quigley <i>v.</i> Ins. Co.	329	Supreme Lodge <i>v.</i> Taylor	255
		Suffolk Fire Ins. Co. <i>v.</i> Boyden	573
Railway Cond. Assoc. <i>v.</i> Robinson		Sweeting <i>v.</i> Ins. Co.	<i>n.</i> 150
	<i>n.</i> 322	Thames & Mersey Ins. Co. <i>v.</i> Co.	228
Rau <i>v.</i> Ins. Co.	<i>n.</i> 125	Thayer <i>v.</i> Ins. Co.	<i>n.</i> 314
Raymond <i>v.</i> Ins. Co.	<i>n.</i> 199	Thebaud <i>v.</i> Ins. Co.	221
Rayner <i>v.</i> Preston	344, <i>n.</i> 536	Thibert <i>v.</i> Lodge	<i>n.</i> 323
Reed <i>v.</i> Ins. Co.	<i>n.</i> 196	Thompson <i>v.</i> Ins. Co.	<i>n.</i> 140
Reischer <i>v.</i> Borwick	231	Titus <i>v.</i> Ins. Co.	176, <i>n.</i> 445
Renier <i>v.</i> Ins. Co.	<i>n.</i> 517	Townsend <i>v.</i> Ins. Co.	<i>n.</i> 175
Riddlesbarger <i>v.</i> Ins. Co.	211	Trade Ins. Co. <i>v.</i> Barracliff	46
Riggs <i>v.</i> Ins. Co.	41	Travelers' Ins. Co. <i>v.</i> Dunlap	287
Ritter <i>v.</i> Ins. Co.	<i>n.</i> 259	Travelers' Ins. Co. <i>v.</i> Ins. Co.	<i>n.</i> 217

TABLE OF CASES.

xiii

	PAGE.		PAGE.
Travelers' Ins. Co. <i>v.</i> McConkey	315	Washington Ins. Co. <i>v.</i> Ins. Co. <i>n.</i>	145
Travelers' Ins. Co. <i>v.</i> Melick	<i>n.</i> 284	Welch <i>v.</i> Ins. Co.	267
Travelers' Ins. Co. <i>v.</i> Murray	<i>n.</i> 285	Welts <i>v.</i> Ins. Co.	301
Trinity College <i>v.</i> Ins. Co.	<i>n.</i> 361	West of Eng Fire Ins. Co. <i>v.</i> Isaacs,	562
Tucker <i>v.</i> Ins. Co.	<i>n.</i> 287	Western & Atl. Pipe Lines <i>v.</i> Ins.	131
Turley <i>v.</i> Ins. Co.	<i>n.</i> 190	Co.	
Turner <i>v.</i> Ins. Co.	146	Western Assur. Co. <i>v.</i> McGlathery	<i>n.</i> 193
Tuttle <i>v.</i> Ins. Co.	<i>n.</i> 287	Western Com. Trav. Assoc. <i>v.</i>	
Underwood <i>v.</i> Ins. Co.	<i>n.</i> 104	Smith	<i>n.</i> 277
Union Mut. Co. <i>v.</i> Frohard	<i>n.</i> 300	Wheeler <i>v.</i> Ins. Co. (N. H.)	162
Union Mut. Co. <i>v.</i> Reif	295	Wheeler <i>v.</i> Ins. Co. (N. Y.)	136
United Firemen's Ins. Co. <i>v.</i> Thomes	<i>n.</i> 531	White <i>v.</i> Ins. Co.	184
United Ins. Co. <i>v.</i> Foote	183	White <i>v.</i> Soc.	<i>n.</i> 122
Van Schoick <i>v.</i> Ins. Co.	423	Whited <i>v.</i> Ins. Co.	524
Van Werden <i>v.</i> Assur. Co.	411	Whiting <i>v.</i> Ins. Co.	<i>n.</i> 140
Van Zandt <i>v.</i> Ins. Co.	<i>n.</i> 263	Whitmore <i>v.</i> Sup. Lodge	<i>n.</i> 52
Vergeront <i>v.</i> Ins. Co.	<i>n.</i> 151, <i>n.</i> 212	Whitwell <i>v.</i> Harrison	219
Viele <i>v.</i> Ins. Co.	417, 472	Wiebeler <i>v.</i> Ins. Co.	79
Wakefield <i>v.</i> Martin	401	Wilkins <i>v.</i> Ins. Co.	515
Walden <i>v.</i> Ins. Co.	104	Wilson <i>v.</i> Hill	1
Wallace <i>v.</i> Ins. Co. (La.)	<i>n.</i> 204	Worley <i>v.</i> Assoc.	<i>n.</i> 322
Wallace <i>v.</i> Ins. Co. (U. S.)	<i>n.</i> 241	Worthington <i>v.</i> Ins. Co.	<i>n.</i> 93, <i>n.</i> 135
Waller <i>v.</i> Assur. Co.	123	Wright <i>v.</i> Assoc.	264, <i>n.</i> 59
Walradt <i>v.</i> Ins. Co.	<i>n.</i> 157	Wynkoop <i>v.</i> Ins. Co.	203
Waring <i>v.</i> Ins. Co.	<i>n.</i> 49	Young <i>v.</i> Ins. Co.	312

A SELECTION OF CASES
ON THE
LAW OF INSURANCE

A SELECTION OF CASES
ON
THE LAW OF INSURANCE.

PART I.
NATURE OF THE CONTRACT.

I. FIRE INSURANCE.

WILSON *v.* HILL.

3 MET. (MASS.) 66. — 1841.

ASSUMPSIT for money had and received. The case was submitted to the decision of the court on the following facts agreed by the parties:

On the 3d of January, 1838, Benson, Phelps & Capron, of Mendon, were the owners of a factory building and real estate there situate, and of certain machinery in said building. The machinery was mortgaged by them to Hill & Chapin, commission merchants in Providence, R. I., to secure to them the general balance due them. Said real estate was subject to two mortgages which are hereinafter mentioned. On said 3d of January, Benson, Phelps & Capron, by their agents, the said Hill & Chapin, caused insurance against loss by fire to be effected by the Manufacturer's Mutual Fire Insurance Company of Rhode Island, for the term of one year then next ensuing, on said factory building and machinery, to the amount of \$2,700; to wit, \$800 on the factory building, \$1,800 on the machinery, tools, etc.; and \$100 on a work-shop and machinery therein. By the terms of the policy, (a copy of which is made part of this case,) the money, in case of loss, was to be paid to Hill & Chapin. On the 19th of April, 1838, Benson & Phelps, in consideration of \$2,800, conveyed all their interest in said factory building and real

estate to William Capron, their cotenant; and on the 10th of May following, Capron, in consideration of \$3,000, conveyed all his interest in the same to the plaintiff; whereby the plaintiff became sole owner thereof, subject to the said mortgages thereon.

The said factory building and machinery were destroyed by fire in July, 1838, and on the 3d day of October following the insurers paid over to said Hill & Chapin the said sum of \$2,700, insured as aforesaid upon said property.

The said Benson, Phelps & Capron afterwards became insolvent, and upon their application to the judge of probate for the county of Worcester, their estate and effects were taken possession of by a messenger on the 1st day of September, 1838. A meeting of their creditors was duly called by said judge of probate, under the insolvent act, (St. 1838, c. 163,) and the defendant was at that meeting duly chosen as their assignee. He afterwards, as such assignee, demanded of Hill & Chapin the money so paid to them by said insurers. Hill & Chapin claimed to retain of it, and did retain of it, in their hands, for what was due to them on their said mortgage, the sum of \$2,051.41. The defendant commenced an action against them for the balance of said money, at the June term, 1839, of the Court of Common Pleas held at Worcester, and at the following September term of said court, they were defaulted, and judgment was rendered against them for \$626.21, and \$11.19 costs, which they paid to the defendant on the 24th of October, 1839, and the defendant gave them a receipt therefor, and a written promise to return the money to them, if Wilson (the present plaintiff) should recover the same amount in a suit which he had commenced, or was about to commence, against them, or against Benson, Phelps & Capron.

Said property was subject, as before mentioned — First. To a mortgage of one undivided third part of said factory building, made by said William Capron to Arnold & Chadsey, to secure the payment of \$5,000. This mortgage was assigned to the plaintiff on the 12th of May, 1838. Second. To a mortgage made on the 24th of May, 1837, by Benson & Phelps to William Whitney, of two-thirds of said factory, etc., to secure the payment of \$1,721, and assigned to the plaintiff on the 17th of October, 1840.

SHAW, C. J. — There are so many decisive objections to the plaintiff's right to recover that it appears difficult to select the most prominent. Even if the plaintiff had any interest in the loss under this policy, and any right to claim the amount of the insurance company, or of their assignees, Hill & Chapin, he would have no

right to follow the money into the hands of the defendant. Dan Hill, the defendant, had been duly and legally appointed the assignee of Benson, Phelps & Capron, the original assured, and in this capacity, and in behalf of the creditors, he demanded the balance of the money in the hands of Hill & Chapin, as a sum due to the insolvent debtors, whom he legally represented; brought an action for that balance, and recovered it, under a judgment. He cannot be considered as having received it to the use of the plaintiff; there was no privity, in fact or in law, between these parties. If Hill & Chapin were liable to the plaintiff, for the same money, they paid it to the defendant in their own wrong, and such payment would have been no defense against the action of the plaintiff, if he were legally entitled to it.

But it appears to us, that the claim of the plaintiff to recover in this action is founded upon an entire misapprehension of the nature and legal effect of a contract of insurance. An insurance of buildings against loss by fire, although in popular language it may be called an insurance of the estate, is in effect a contract of indemnity, with an owner, or other person having an interest in the preservation of the buildings, as mortgagee, tenant, or otherwise, to indemnify him, against any loss, which he may sustain, in case they are destroyed or damaged by fire. If, therefore, the assured has wholly parted with his interest, before they are burnt, and they are afterwards burnt, the underwriter incurs no obligation to pay anybody. The contract was to indemnify the assured; if he has sustained no damage, the contract is not broken. If, indeed, on a transfer of the estate, the vendor assigns his policy to the purchaser, and this is made known to the insurer, and is assented to by him, it constitutes a new and original promise to the assignee, to indemnify him in like manner, whilst he retains an interest in the estate; and the exemption of the insurer from further liability to the vendor, and the premium already paid for insurance for a term not yet expired, are a good consideration for such promise, and constitute a new and valid contract between the insurer and the assignee. But such undertaking will be binding, not because the policy is in any way incident to the estate, or runs with the land, but in consequence of the new contract. Even the assignment of a chose in action, with the consent of the debtor, and a promise on his part to pay the assignee, constitute a new contract, on which the assignee may sue in his own name. *Mowry v. Todd*, 12 Mass. 281.

For the general principles herein stated we would refer to the authorities cited by Mr. Chapin. *Lynch v. Dalzell*, 3 Bro. P. C. (1st ed.) 497; *The Sadler's Company v. Badcock*, 2 Atk. 554; Marshall

on Ins. (3d ed.) 800-807; *Carroll v. Boston Marine Ins. Co.*, 8 Mass. 515; *Etna Fire Ins. Co. v. Tyler*, 16 Wend. 397.

These considerations, however, do not apply to a case where the assured, after a loss, assigns his right to recover that loss; it would stand on the same footing as the assignment of a debt or right to recover a sum of money actually due, which, like the assignment of any other chose in action, would give the assignee an equitable interest and a right to recover in the name of the assignor, subject to set-off and all other equities. * * *

No assignment was ever made by Benson, Phelps & Capron to the plaintiff; and he can only claim, therefore, as assignee in law, in consequence of having been a purchaser of the estate; which has already been considered.

But then it is contended, that at the time when the company paid the amount of the loss to Hill & Chapin, for the original parties insured, in consequence of their transfer of the estate, before the loss, they could not legally recover, and therefore the money was voluntarily paid by the company, and must be deemed to have been paid, subject to the prior lien of Hill & Chapin, the agents, equitably for the use of the plaintiff, who has become the purchaser of the estate. I do not think we have the facts stated with sufficient fullness and accuracy to enable us to judge whether the assured had parted with all their interest, at the time of the loss. It is stated that the plaintiff had purchased the estate, subject to the mortgages. If the assured remained still liable to the payment of the debts for which those mortgages were given as collateral security, then they still had an interest in the estate; because a fire would impair or destroy the value of the property appropriated to the payment of their debt; and they therefore had an interest in its preservation, covered by the policy. One of the mortgages on the property was not assigned to the plaintiff till after the loss. Nor does it appear that the assured had been exempted from the payment of any of the mortgage debts. We cannot therefore say with confidence that at the time of the payment by the company, they were not legally liable for such payment. At all events, they yielded to a claim of right, and paid to Hill & Chapin, pursuant to the provisions of the terms of the policy, to enure to them to the extent of their lien; and as to the balance, to the use of their principals. There are no facts on which to raise an implication that they voluntarily paid, upon considerations of policy, or intended to pay anything to the use of the owner of the estate, or that they had any regard, in such payment, to any supposed equitable claim to the present plaintiff.

Plaintiff nonsuit.

RAYNER *v.* PRESTON.

18 CH. D. 1. — 1881.

[*Reported herein at p.344.*]PEOPLE'S STREET RY. *v.* SPENCER.

156 PA., 85. — 1893.

[*Reported herein at p.341.*]QUARLES *v.* CLAYTON.

87 TENN., 308. — 1889.

[*Reported herein at p.336.*]

II. MARINE INSURANCE.

POWLES AND OTHERS *v.* INNES.

11 MEESON & WELSEY, 10. — 1843.

THIS was an action of assumpsit on a policy of insurance on ship.

The declaration stated that the policy was made by the plaintiffs as agents for Robert Page and Robert Chamberlain; that Page and Chamberlain, and one Sarah Banks, were, during the risk and until and at the time of the loss, interested in the ship to the amount of the money insured; and that the ship was totally lost. The defendant pleaded, first, payment of 75*l.*; secondly, as to the residue, non-assumpsit; thirdly, except as to 75*l.*, that although Chamberlain was interested in the ship during the risk to the amount of 400*l.*, in respect of which the plaintiffs were entitled to recover the said sum of 75*l.*, yet that, save as aforesaid, Chamberlain and Page were not interested in the ship during the risk, and that the policy was not made by the plaintiffs as agents for Sarah Banks or for her benefit, nor did she give any order for effecting the same; and fourthly, except as to 75*l.*, that although Chamberlain was interested during the risk to the amount of 400*l.*, etc., yet, save as aforesaid, Chamberlain, Page, and Banks were not interested in the ship during the risk, *modo et formâ*. On these pleas issues were joined.

On the 22d of January, 1838, the plaintiffs, who are insurance agents, by directions from, and on account and for the benefit of Robert Page and Robert Chamberlain, in respect of their two-thirds of the vessel, effected a policy of insurance on the ship Commerce. The premiums were charged to and paid by Page and Chamberlain. The policy was subscribed by the defendant for 150/. At the time of the insurance and at the time of the loss the vessel was of the value of 1,200/. At the time of effecting the insurance Chamberlain, Page, and Sarah Banks were each interested in one-third of the vessel. The vessel was lost in January, 1839, within the time mentioned in the policy. Before the loss Page, by bill of sale, conveyed his share to Sarah Banks. From the time of the said bill of sale down to the time of the loss, Chamberlain and Sarah Banks were owners of the Commerce, the former of one-third and the latter of two-thirds of that ship.

LORD ABINGER, C. B. — I am clearly of opinion that the defendant is entitled to our judgment. The last authority that has been cited is a mere note of a *Nisi Prius* case, the correctness of which I greatly doubt. The contract of insurance was originally only a contract of wager, that the vessel should arrive at her destination; since the legislature has adopted it, it is a contract of indemnity only, and nobody can recover in respect to the loss who is not really interested. The policy is but a chose in action, and cannot pass merely by the assignment of the ship.

PARKE, B. — I am of the same opinion. The plaintiff can only recover an indemnity. Then what has this party lost, if he has sold his interest in the ship, irrespective of the policy? Bank's interest is not protected, because she gave no authority to effect the insurance. Unless, therefore, there was some understanding that the policy should be kept alive for her benefit, the plaintiffs, suing on behalf of Page, have lost nothing. If the policy had been handed over with the bill of sale, or there had been an order to the brokers to hand it over, the case would be different; then the parties might sue as trustees for the purchaser; but we cannot infer that, no facts being stated in the case to warrant such an inference.

GURNEY, B., concurred.

Judgment for the defendant.

MERCHANTS AND MINERS' TRANS. CO. *v.* ASSOC. FIRE-
MEN'S INS. CO.

53 MD. 448. — 1880.

[Reported herein at p. 232.]

III. LIFE INSURANCE.

DALBY *v.* INDIA & LONDON LIFE ASSURANCE CO.

15 C. B., 365. — 1854.

PARKE, B. — This case comes before us on a bill of exceptions to the ruling of my Brother Creswell at *Nisi Prius*. We learn that, on the trial, he reserved the important point which arose in it for the consideration of the Court of Common Pleas; and that when it came on for discussion, it was thought right to put it on the record in the shape of a bill of exceptions, that it may be carried, if it should be thought proper, to the highest tribunal; and we have now, after a very able argument on both sides, to dispose of it in this Court of Error.

It is an action on what is usually termed a policy of life assurance, brought by the plaintiff as a trustee for the Anchor Life Assurance Company, on a policy for £1,000 on the life of his late Royal Highness, the Duke of Cambridge.

The Anchor Life Assurance Company had insured the Duke's life in four separate policies — two for £1,000, and two for £500 each, granted by that company to one Wright. In consequence of a resolution of their directors, they determined to limit their insurances to £2,000 on one life; and, this insurance exceeding it, they effected a policy with the defendants for £1,000 by way of counter-insurance.

At the time this policy was subscribed by the defendants, the Anchor Company had unquestionably an insurable interest to the full amount. Afterwards an arrangement was made between the office and Wright for the former to grant an annuity to Wright and his wife in consideration of a sum of money, and of the delivery up of the four policies to be canceled, which was done; but one of the directors kept the present policy on foot, by the payment of the premiums till the Duke's death.

It may be conceded, for the purpose of the present argument, that these transactions between Wright and the office totally put an end to that interest which the Anchor Company had when the policy was effected, and in respect of which it was effected; and that, at the time of the Duke's death, and up to the commencement of the suit, the plaintiff had no interest whatever.

This raises the very important question, whether, under these circumstances, the assurance was void and nothing could be recovered thereon.

If the Court had thought some interest at the time of the Duke's death was necessary to make the policy valid, the facts attend-

ing the keeping up of the policy would have undergone further discussion.

There is the usual averment in the declaration that at the time of the making of the policy, and thence until the death of the Duke, the Anchor Assurance Company was interested in the life of the Duke, and a plea that they were not interested *modo et formâ* — which traverse makes it unnecessary to prove more than the interest at the time of making the policy, if that interest was sufficient to make it valid in point of law. *Lush v. Russell*, 5 Exch. 203. We are all of opinion that it *was* sufficient; and but for the case of *Godsall v. Boldero*, 9 East, 72, should have felt no doubt upon the question.

The contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life — the amount of the annuity being calculated, in the first instance, according to the probable duration of the life; and, when once fixed, it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous offices) the same, on the other. This species of insurance in no way resembles a contract of indemnity.

Policies of assurance against fire and against marine risks, are both properly contracts of indemnity — the insurer engaging to make good, within certain limited amounts, the losses sustained by the assured in their buildings, ships, and effects. Policies on maritime risks were afterwards used improperly, and made mere wagers on the happening of those perils. This practice was limited by the 19 G. 2, c. 37, and put an end to in all except a few cases. But, at common law, before this statute with respect to maritime risks, and the 14 G. 3, c. 48, as to insurances on lives, it is perfectly clear that all contracts for wager-policies, and wagers which were not contrary to the policy of the law, were legal contracts; and so it is stated by the Court in *Cousins v. Nantes*, 3 Taunt. 513, to have been solemnly determined in the case of *Lucena v. Crawford*, 2 Bos. & P. 324, 2 N. R. 269, without even a difference of opinion among all the judges. To the like effect was the decision of the Court of Error in Ireland, before all the judges except three, in *The British Insurance Company v. Magee, Cooke & Alcock*, 182, that the insurance was legal at common law.

The contract, therefore, in this case, to pay a fixed sum of £1,000 on the death of the late Duke of Cambridge, would have been unquestionably legal at common law, if the plaintiff had had an

interest thereon or not; and the sole question is, whether this policy was rendered illegal and void by the provisions of the statute 14 G. 3, c. 48. This depends upon its true construction.

The statute recites, that the making insurances on lives and other events wherein the assured shall have no interest, hath introduced a mischievous kind of gaming; and, for the remedy thereof, it enacts, "that no insurance *shall be made* by any one on the life or lives of any person or persons, or on any other events whatsoever, wherein the person or persons for whose use and benefit, or on whose account such policy shall be made, *shall have* no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever."

As the Anchor Assurance Company had unquestionably an interest in the continuance of the life of the Duke of Cambridge — and that to the amount of £1,000, because they had bound themselves to pay a sum of £1,000 to Mr. Wright on that event — the policy effected by them with the defendants was certainly legal and valid, and the plaintiff, without the slightest doubt, could have recovered the full amount, if there were no other provisions in the Act.

This contract is good at common law, and certainly not avoided by the 1st section of the 14 G. 3, c. 48. This section, it is to be observed, does not provide for *any particular amount* of interest. According to it, if there was *any* interest, however small, the policy would not be avoided.

The question arises on the third clause. It is as follows: "And be it further enacted, that, in all cases where the insured *hath* interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers, than the amount or value of the interest of the assured in such life or lives, or other event or events."

Now, what is the meaning of this provision?

On the part of the plaintiff, it is said, it means only that in all cases in which the party insuring has an interest when he effects the policy, his right to recover and receive is to be limited to that amount; otherwise, under color of a small interest, a wagering policy might be made to a large amount — as it might if the first clause stood alone. The right to recover, therefore, is limited to the amount of the interest *at the time of effecting the policy*. Upon that value, the assured must have the amount of premium calculated; if he states it truly, no difficulty can occur; he pays in the annuity for life the fair value of the sum payable at death. If he misrepresents, by over-rating the value of the interest, it is his own fault in

paying more in the way of annuity than he ought; and he can recover only the true value of the interest in respect of which he effected the policy; but that value he *can* recover. Thus, the liability of the assurer becomes constant and uniform, to pay an unvarying sum on the death of the *cestui que vie*, in consideration of an unvarying and uniform premium paid by the assured. The bargain is fixed as to the amount on both sides.

This construction is effected by reading the word "hath" as referring to the time of effecting the policy. By the first section, the assured is prohibited from effecting an insurance on a life or on an event wherein he "shall have" no interest — that is, at the time of assuring; and then the third section requires that he shall cover only the interest that he "hath." If he has an interest when the policy is made, he is not wagering or gaming, and the prohibition of the statute does not apply to his case. Had the third section provided that no more than the amount or value of the interest should be *insured*, a question might have been raised, whether, if the insurance had been for a larger amount, the whole would not have been void; but the prohibition to recover or receive more than that amount, obviates any difficulty on that head.

On the other hand, the defendants contend that the meaning of this clause is, that the assured shall recover no more than the value of the interest which he has at the time of the recovery, or receive more than its value at the time of the receipt.

The words must be altered materially to limit the sum to be recovered to the value *at the time of the death*, or (if payable at a time after death) when the cause of action accrues.

But there is a most serious objection to either of these constructions. It is that the written contract, which for the reasons given before, is not a wagering contract, but a valid one permitted by the statutes and very clear in its language, is by this mode of construction completely altered in its terms and effect. It is no longer a contract to pay a certain sum on the value of a then-existing interest, in the event of death, in consideration of a fixed annuity calculated with reference to that sum; but a contract to pay — contrary to its express words — a *varying* sum, according to the alteration of the value of that interest at the time of the death, or the accrual of the cause of action, or the time of the verdict or execution; and yet the price or the premium to be paid is fixed, calculated on the original fixed value, and is unvarying; so that the assured is obliged to pay a certain premium every year, calculated on the value of his interest at the time of the policy, in order to have a right to recover an uncertain sum, viz., that which happens to be the value of the

interest at the time of the death, or afterwards, or at the time of the verdict. He has not, therefore, a sum certain which he stipulated for and bought with a certain annuity; but it may be a much less sum, or even none at all.

This seems to us so contrary to justice and fair dealing and common honesty, that this construction cannot, we think, be put upon this section. We should, therefore, have no hesitation, if the question were *res integra*, in putting the much more reasonable construction on the statute, that, if there is an interest at the time of the policy, it is not a wagering policy, and that the true value of that interest may be recovered in exact conformity with the words of the contract itself.

The only effect of the statute is to make the assured value his interest at its true amount when he makes the contract.

But it is said that the case of *Godsall v. Boldero*, 9 East, 72, has concluded this question.

Upon considering this case it is certain that Lord Ellenborough decided it upon the assumption that a life-policy was in its nature a contract of indemnity, as policies on marine risks and against fire undoubtedly are; and that the action was, in point of law, founded on the supposed damnification occasioned by the death of the debtor existing at the time of the action brought; and his Lordship relied upon the decision of Lord Mansfield in *Hamilton v. Mendes*, 2 Burr. 1210, that the plaintiff's demand was for an indemnity only. Lord Mansfield was speaking of a policy against marine risks, which is in its terms a contract for indemnity only. But that is not of the nature of what is termed an assurance for life; it really is what it is on the face of it—a contract to pay a certain sum in the event of death. It is valid at common law; and, if it is made by a person having an interest in the duration of the life, it is not prohibited by the statute 14 G. 3, c. 48.

But, though we are quite satisfied that the case of *Godsall v. Boldero* was founded on a mistaken analogy and wrong, we should hesitate to overrule it, though sitting in a Court of Error, if it had been constantly approved and followed and not questioned, though many opportunities have been offered to question it. It was stated that it had not been disputed in practice and had been cited by several eminent judges as established law. The judgment itself was not, and could not be, questioned in a Court of Error; for, one of the issues, *nil debet*, was found for the defendant.

Since that case we know practically, and that circumstance is mentioned by some of the judges in the cases hereinafter referred to, that the insurance offices, generally speaking, have not availed

themselves of the decision, as they found it very injurious to their interest to do so. They have therefore, generally speaking, paid the amount of their life insurances, so that the number of cases in which it could be questioned is probably very small indeed. And it may truly be said that, instead of the decision in *Godsall v. Boldero* being uniformly acquiesced in and acted upon it has been uniformly disregarded.

Then, as to the cases. There is no case at law, except that of *Barber v. Morris*, 1 M. & Rob. 62, in which the case of *Godsall v. Boldero* was incidentally noticed as proving it to be necessary that the interest should continue till the death of the *cestui que vie*. It was proved in that case to be the practice of the particular office in which that assurance was made to pay the sums assured without inquiry as to the existence of an insurable interest; and on that account it was held that the policy, though in that case the interest had ceased, was a valuable policy and the plaintiff could not recover on the ground that the defendant, the vendor of it, was guilty of fraudulent concealment in not disclosing that the interest had ceased. This was the point of the case; and, though there was a dictum of Lord Tenterden, that the payment of the sum insured could not be enforced, it was not at all necessary to the decision of the case.

The other cases cited on the argument in this case, were cases in equity, where the propriety of the decision of *Godsall v. Boldero* did not come in question.

The questions arose as to the right of the creditor and debtor, *inter se*, where the offices have paid the value of a policy, in *Humphrey v. Arabin*, 2 Lloyd & G. 318; *Henson v. Blackwell*, 2 Hare, 434, cor. Sir J. Wigram, V. C.; *Phillips v. Eastwood*, 1 Lloyd & G. (Cas. temp. Sugden) 281 — where the point decided was that a life-policy, as a security for a debt, passed under a will bequeathing debts; the Lord Chancellor stating that the offices found it not for their benefit to act on the rigid rule of *Godsall v. Boldero*. In these cases the different judges concerned in them do not dispute — some, indeed, appear to approve of — the case of *Godsall v. Boldero*: but it was not material in any to controvert it; and the questions to be decided were quite independent of the authority of that case.

We do not think we ought to feel ourselves bound, sitting in a Court of Error, by the authority of this case, which itself could not be questioned by writ of error; and as so few, if any, subsequent cases have arisen in which the soundness of the principle there

relied upon could be made the subject of judicial inquiry; and, as in practice, it may be said that it has been constantly disregarded.

Judgment reversed, and *venire de novo*.¹

IV. MUTUAL BENEFIT INSURANCE.

COMMONWEALTH *v.* WETHERBEE.

105 MASS., 149. — 1870.

INDICTMENT on the St. of 1867, c. 267, § 5, for acting in the transaction of the business of insurance as agent of an insurance company not incorporated in this Commonwealth, without first procuring from the insurance commissioner a certificate of authority to do so.

GRAY, J. — A contract of insurance is an agreement by which one party, for a consideration, (which is usually paid in money, either in one sum, or at different times during the continuance of the risk,) promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest. In fire insurance and marine insurance the thing insured is property; in life or accident insurance it is the life or health of a person. In either case neither the times and amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurer, affect the question

¹ "There being a debt at the time the policy is issued, it is then valid. It contains no condition referring to the continuance of the indebtedness. But, on the contrary, the policy evidences a flat and positive promise to pay a given sum at the termination of the life named. * * * From the nature of the contract, which is paid for by the creditor, he needs the payment of the policy to do complete justice to him. Suppose he has received, subsequent to payment of premiums for years, the debt due from his debtor, he has thus received only what it may be assumed he has advanced or loaned to his debtor. He has received nothing for the series of premiums he has delivered over from year to year to the insurer to keep alive the policy. So, too, in the case at hand, if we were to hold that the policy was avoided by payment or discharge in bankruptcy of the debt, the creditor would surely be the loser of the premiums paid, after the payment of his debt or the discharge in bankruptcy, and the insurance company would be the gainer. It would keep in its coffers moneys which it received as a consideration for its *promise, which it had not kept*. It would be the gainer by the incidental circumstance that the debtor had paid what only he justly owed his creditor, or what he had escaped paying by obtaining a discharge in bankruptcy. Surely no such contingency was taken into mind or measured in fixing the amount of premiums demanded for the policy. That

whether the agreement between them is a contract of insurance. All that is requisite to constitute such a contract is the payment of the consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by a contingency contemplated in the contract.

The contract made between the Connecticut Mutual Benefit Company and each of its members, by the certificate of membership issued according to its charter, does not differ in any essential particular of form or substance from an ordinary policy of mutual life insurance. The subject insured is the life of the member. The risk insured is death from any cause not excepted in the terms of the contract. The assured pays a sum fixed by the directors and not exceeding ten dollars, at the inception of the contract, and assessments of two dollars each annually, and of one dollar each upon the death of any member or the division to which he belongs, during the continuance of the risk. In case of the death of the assured by a peril insured against, the company absolutely promises to pay to its representatives, in sixty days after receiving satisfactory notice and proof of his death, "as many dollars as there are members in" the same division, the number of which is limited to five thousand. The payment of this sum is subject to no contingency but the insolvency of the corporation. The means of paying it are derived from the assessments collected upon his death from other members; from the money received upon issuing other certificates of membership, which the by-laws declare may, after pay-

amount was ascertained by the standard tables relating to the probabilities of human life upon which life insurance companies anchor when they fix and determine the schedule of premiums to be exacted in the conduct of their business. We are, upon principle, prepared to agree with the English court in its conclusion in *Dalby v. India and London Life Assurance Company* (28 Eng. Law and Eq. 312). Indeed, we think the doctrine of that case has been accepted in this state, and that both upon principle and authority we should say that the insurer is bound to fulfil its contract, valid in its inception, notwithstanding the debtor upon whose life it runs may have paid his creditor or obtained a discharge in bankruptcy therefrom. *Rawls v. American Life Ins. Co.*, 36 Barb. 357; affirmed 27 N. Y. 282; *St. John v. American Mutual Life Ins. Co.*, 3 Kern. 31, and note at p. 41; *Olmsted v. Keys*, 85 N. Y. 598, 599; *Bliss on Life Ins.*, § 30; *May on Ins.*, §§ 115, 116."—*Ferguson v. Mass. Mut. Life Ins. Co.*, 32 Hun, 311, 312.

In *Conn. Life Ins. Co. v. Schaefer*, 94 U. S. 457, the policy was taken by husband and wife upon their joint lives, payable to the survivor. Subsequently they were divorced a *vinculo matrimonii*, and the wife having paid the premium up to her former husband's death, sued on the policy. It was held that the policy being valid at its inception, the subsequent cessation of her insurable interest did not affect her claim.

ment of expenses, be "used to cover losses caused by the delinquencies of members;" and from the guarantee fund of one hundred thousand dollars, established by the corporation under its charter.

This is not the less a contract of mutual insurance upon the life of the assured, because the amount to be paid by the corporation is not a gross sum, but a sum graduated by the number of members holding similar contracts; nor because a portion of the premiums is to be paid upon the uncertain periods of the deaths of such members; nor because, in case of nonpayment of assessments by any member, the contract provides no means of enforcing payment thereof, but merely declares the contract to be at an end, and all moneys previously paid by the assured, and all dividends and credits accrued to him, to be forfeited to the company.

The fact, offered to be proved by the defendant, that the object of the organization was benevolent and not speculative, has no bearing upon the nature and effect of the business conducted and the contracts made by the corporation.

The ruling that this association was an insurance company, within the meaning of the statute upon which the defendant was indicted, was therefore correct, and his

Exceptions must be overruled.

V. ACCIDENT INSURANCE.

BARKER, J., IN EMPLOYERS' LIABILITY ASSURANCE CO. *v.* MERRILL.

155 MASS., 404, 408. — 1892.

THE distinguishing feature of what is known in our legislation as "accident insurance" is that it indemnifies against the effects of accidents resulting in bodily injury or death. Its field is not to insure against loss or damage to property, although occasioned by accident. So far as the latter class of insurance has been developed, it has been with reference to boilers, plate-glass, and perhaps to domestic animals, and injuries to property by street cars, and is known as "casualty insurance." The development of accident insurance has been analogous to the development of fire and of life insurance. The original fire policy stipulated for payment only for the loss of tangible property destroyed or injured in its own substance by fire. But fire insurance is now made to cover rents lost by the destruction of buildings by fire, and profits unearned because

of the destruction by fire of a plant by the use of which they would have been secured. The original life policy was payable only at the death of the assured, but now the forms of life insurance are very numerous, and adapted to meet all the risks into which the continuation of the life of the person insured enters as a constituent. The invention of accident insurance preceded the recent flood of actions of tort for personal injuries, and the only risk from accidents to the person then commonly thought of as a factor in ordinary life was the risk of injury to one's own person. Such insurance grew popular, was afterwards seen to be too costly for general use, and was abandoned by most of the companies which engaged in the business. But when it came to be understood that every man engaged in business, and every owner or lessee of business property, was exposed to heavy losses from accidents to the persons of others, the chance of which no prudent man could afford to ignore, a new demand for accident insurance against personal injuries arose, which it was the legitimate function of accident insurance companies to meet. By the words of clause 5 of § 29, of the statute, (St. 1887, c. 214,) such companies formed or operating in Massachusetts were expressly authorized to insure against bodily injuries and death by accident, and were not by the words of any statute restricted to risks by accidents to the person of the assured. So long as they confined themselves to insurance against accidents to the person, and to contracting to indemnify the assured against losses by injuries to persons in whom he had an insurable interest, because legally liable for the results of the accident, they were within the legitimate scope of accident insurance.

VI. FIDELITY AND GUARANTY INSURANCE.

PEOPLE *v.* ROSE.

174 ILL., 310. — 1893.

WILKIN, J. — This is an original petition for mandamus against James A. Rose, as Secretary of State. The petition sets forth that on January 27, 1893, petitioners made application to the respondent for a license authorizing them to open subscription books to the capital stock of a proposed corporation. The application was made in due form, and accompanied by the requisite fee. The object of the corporation, as contained in the statement, is as follows: "To transact in the State of Illinois and elsewhere the business of guarantying the fidelity of persons holding public or private places of

trust, and the performance by persons, firms, and corporations of contracts, bonds, recognizances, and undertakings of every kind, and of becoming surety on bonds required by law, and on every kind of contract, obligation, and undertaking of persons, firms, and corporations." The Secretary refused to issue the license, upon the ground that the statute under which the application is made does not authorize the organization of corporations for the objects stated in the application. Section 1 of the statute, entitled "An act concerning corporations," approved April 18, 1872, provides "that corporations may be formed in the manner provided by this act, for any lawful purpose, except banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money, provided," etc. The only question here raised is whether or not the objects, or any of them, of the proposed corporation, fall within the exception "insurance."

The following definitions of the term "insurance" are cited from standard authorities by the attorney-general on behalf of the respondent: "Guaranty insurance is a contract whereby one, for a consideration, agrees to indemnify another against loss arising from the want of integrity, fidelity, or insolvency of employes and persons holding positions of trust, against insolvency of debtors, losses in trade, losses from nonpayment of notes and other evidences of indebtedness, or against breach of contract. It includes other forms of insurance, which are specifically classified as 'fidelity guaranty,' 'credit guaranty,' etc." 1 Joyce, Ins § 12. "Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, prejudice, or damage by the happening of the perils specified, to certain things which may be exposed to them." *Lucine v. Craufurd*, 2 Bos & P. 300. "Insurance, in its most general sense, is a contract whereby one party agrees to indemnify another in case he shall suffer loss in respect of a specified subject by a specified peril." 11 Am. & Eng. Enc. Law, 280. "Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss. Such, in its most general terms, is the definition of the contract which is to constitute the subject of the following chapters. It is substantially the definition given long ago by Roccus, and is recommended alike by its brevity and its comprehensiveness, — qualities upon which subsequent writers have scarcely been able to improve. * * * It had its origin in the necessities of commerce. It has kept pace with its progress, expanded to meet its rising wants and to cover its ever-widening fields, and, under the guidance of the spirit of modern

enterprise tempered by a prudent forecast, it has, from time to time, with wonderful facility, adapted itself to the new interests of an advancing civilization. It is applicable to every form of possible loss. Wherever danger is apprehended or protection required, it holds out its fostering hand, and promises indemnity." 1 May on Insurance, §§ 1, 2, "A contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against certain risks." 1 Phillips on Insurance, § 1. "A contract by which a person, in consideration of a gross sum or a periodical payment, undertakes to pay a larger sum on the happening of a particular event." Smith on Common Law, 299. "In law, a contract, by which one party, for an agreed consideration, which is proportioned to the risk involved, undertakes to compensate the other for loss on a specified thing from specified causes." Century Dict. "Insurance." "An act or system of insuring or assuring against loss; specifically, the system by or under which indemnity or pecuniary payment is guaranteed by one party or several parties to another party, in certain contingencies, upon specified terms." Standard Dict. "Insurance." "The act of insuring against loss or damage by a contingent event; a contract whereby one party undertakes to indemnify or guaranty the other against loss by certain specified risks." Webster's Dict. "Insurance."

It is said in 9 Am. & Eng. Ency. of Law, 65 (cited in *People v. Fidelity & Casualty Co.*, 153 Ill. 25.): "Guaranty insurance is, in its practical sense, a guaranty or insurance against loss in case a person named shall make a designated default, or be guilty of specified conduct. It is usually against the misconduct or dishonesty of an employee or officer, though sometimes against the breach of a contract. This branch of insurance is so much more modern in origin and development than fire, marine, life and accident insurance that there are few decisions upon the subject; but the business is gradually increasing, and is doubtless destined to take an important place in the commercial world. It may be confidently stated, notwithstanding the comparative absence of specific decisions, that the general principles applicable to other classes of insurance are applicable here as well. Thus, the general doctrine of warranty, representation, and concealment, as applied to fire, life, and marine insurance, is applicable also to the subject of guaranty insurance. It was held in a Canadian case that a company was liable on a policy guarantying the faithful and diligent performance of the duty of a clerk, where such clerk went to lunch, leaving a large sum of money in open bags in his room, which money disappeared while he was gone. Overdrafts allowed without security,

by collusion with the party making the overdrafts, is within a policy which insures against loss 'by the want of integrity, honesty, and fidelity, or by the negligence, default, or irregularities, of the manager.' "

In *Shakman v. U. S. Credit-System Co.*, 92 Wis. 366, it was held that a contract to indemnify a merchant against loss from insolvency of customers was a contract of insurance, and it was said: "We regard the contract before us as unquestionably a contract of insurance. An insurance contract is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril. The peril of loss by the insolvency of customers is just as definite and real a peril to a merchant or manufacturer as the peril of loss by accident, fire, lightning, or tornado, and is in fact much more frequent. No reason is perceived why a contract of indemnification against this ever-present peril is not just as legitimately a contract of insurance as a contract which indemnifies against the more familiar, but less frequent, peril by fire. This very contract has been (*sub silentio*) construed as a policy of insurance by the Supreme Court of New Jersey. *Robertson v. U. S. Credit-System Co.*, 57 N. J. Law, 12. The contract being, then, a contract of insurance, and the defendant's business being the making of such contracts, it follows that the defendant is an insurance corporation, within the meaning of sections 1977 and 1978, Rev. St." In *Tebbets v. Guaranty Co.*, 19 C. C. A. 281, 73 Fed. 95, the action was upon a policy of insurance against business losses or "uncollectible debts" issued by the defendant to the plaintiff, and it was said: "Insurance against mercantile losses is a new branch of the business of underwriting, and but few cases dealing with policies of that character have as yet found their way into the courts. The necessarily nice adjustments of the respective proportions of loss to be borne by the insurer and the insured, the somewhat intricate provisions which are required in order to make such business successful, and the lack of experience in formulating the stipulations to be entered into by both the parties to such a contract, have naturally tended to make the forms of policy crude and difficult of interpretation."

We do not understand counsel for petitioners to deny that under these authorities and definitions one or more of the objects stated in its application fall within the term "insurance." But it is insisted that inasmuch as at the time of the passage of the general Incorporation law of 1872, under which they seek to organize, there were already in existence statutory provisions for the incorporation of companies known as "insurance companies," — that is to say,

fire, inland navigation, and marine insurance companies, also life insurance companies, — and that provisions like those of the charter here sought by petitioners were practically unknown at that time therefore the legislature did not intend, by the use of the word "insurance," other kinds of insurance than existed at that time, and named in the prior enactments. The proposition is untenable. While corporations of this character have not until recently been organized, they must, under the foregoing authorities, be treated as a form of insurance companies, and as such they fall within the express limitation named in the statute. The language of the exception, in common acceptation, includes all insurance companies, and it is not for the court to say that only certain classes were intended. "Courts cannot, as a general rule, disregard the plain language of a statute. It is their duty to accept it as they find it, and enforce it as plainly written." *Coke Co. v. Downey*, 127 Ill. 201, and authorities cited. "It is not the province of the judiciary to make laws, but to construe and interpret them, and pass upon their validity." Referring to authorities cited, it is further said: "A careful examination of all these cases will show that where the construction given to the words of a statute is variant from their strict and literal meaning, such construction is only justified upon the ground that it effectuates the intention of the legislature as manifestly disclosed by a consideration of the whole context." *Wunderle v. Wunderle*, 144 Ill. 40.

The manifest purpose of the legislature in excepting banking, insurance, real-estate brokerage, and other corporations from the provisions of the act authorizing the incorporation of companies for other lawful purposes, was that these excepted corporations should be restrained by more strict requirements, securing the safe conduct and correct administration of their affairs. The object stated in the petitioner's application — especially that of guarantying the performance by persons, firms, and corporations of contracts, bonds, recognizances, and undertakings of every kind — is not only to enter into contracts of insurance, within the meaning of the authorities cited, but within the spirit and reason of the exception. We think the application of the petitioners was properly refused, and the petition for a writ of mandamus will be denied.

Writ denied.¹

MAGRUDER, J., dissenting.

CARTER, C. J. — I do not agree to the conclusion reached in this case.

¹ "Although of more recent origin than the ordinary forms of insurance, such as fire, marine, and life, that this bond is a branch of insurance is clearly

apparent. Cases involving this form of contract are extremely few, still, that the law of insurance applies by analogy is undoubtedly true, and this was fully recognized and clearly stated by the circuit court of appeals for this circuit in *Supreme Council Catholic Knights of America v. Fidelity & Casualty Co. of New York*, 63 F. 48, 11 C. C. A. 96, in which Judge Lurton, delivering the opinion, said: 'With reference to bonds of this kind, executed upon a consideration, and by a corporation organized to make such bonds for profit, the rule of construction applied to ordinary sureties is not applicable. The bond is in the terms prescribed by the surety, and any doubtful language should be construed most strongly against the surety, and in favor of the indemnity, which the assured had reasonable grounds to expect. The rule applicable to fire and life insurance is the rule, by analogy, most applicable to a contract like that in this case. This method of furnishing bond to make good loss is rapidly superseding all others in the case of officers of private corporations, and I am advised that legislation by the general assembly in session enables companies engaging in this business to make bonds for all public officials of the state and counties thereof. The business is, therefore, becoming one of vast public as well as private importance, and it cannot be objected if rules of reasonably stringent liability are applied to these contracts, as in other forms of insurance. Conditions on which forfeiture of the contract is claimed being construed strongly against insurer and liberally in favor of insured, the burden is on defendant, and the defense must be clearly made out. *Cotton v. Casualty Co.*, 41 Fed. 506; *Steel v. Insurance Co.*, 2 C. C. A. 463, 51 Fed. 723, and cases cited; *Moulton v. Insurance Co.*, 111 U. S. 341, 4 Sup. Ct. 466; *Supreme Council Catholic Knights of America v. Fidelity & Casualty Co. of New York*, 63 Fed. 48, 11 C. C. A. 96.' — *Mechanics' Savings Bank v. Guarantee Co.*, 68 Fed. 459, 462.

PART II.

FORMATION OF THE CONTRACT.

I. PARTIES TO THE CONTRACT.

a. Infants.

JOHNSON *v.* NORTHWESTERN MUT. LIFE INS. CO.

56 MINN., 365. — 1894.

PLAINTIFF, when seventeen years old, obtained a policy of insurance from defendant company. Immediately after he became of age, he disaffirmed the contract, tendered back the policy, and demanded the return of the money he had paid upon it. The defendant did not return the money and plaintiff brought this action to recover it. The substance of the provisions of the policy with respect to the surrender of the policy is given in the last paragraph of Judge Mitchell's opinion. Defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

Demurrer overruled. Defendant appeals.

MITCHELL, J. — This case was argued and decided at the last term of this court.¹ A reargument was granted for the reasons that although the amount was small the legal principles involved were important; the time permitted for argument under our rules was brief; the case was decided near the end of the term, without, perhaps, the degree of consideration that its importance demanded; and, on further reflection, we are not satisfied that our decision was correct.

The former opinion laid down the following propositions, to which we still adhere: (1) That the contract of insurance was of benefit to the infant himself, and was not a contract for the benefit of third parties. (2) The contract, so far as appears on its face, was the

¹Opinion, 56 Minn. 369.
[22]

usual and ordinary one for life insurance, on the customary terms, and was a fair and reasonable one, and free from any fraud, unfairness, or undue influence on part of the defendant, unless the contrary is to be presumed from the fact that it was made with the infant. It is not correct, however, to say that the plaintiff has received no benefit from the contract, or that the defendant has parted with nothing of value under it. True, the plaintiff has received no money, and the defendant has paid none to the plaintiff; but the life of the former was insured for four years, and if he had died during that time, the defendant would have had to pay the amount of the policy to his estate. The defendant carried the risk all that time, and this is the essence of the contract of insurance. Neither does it follow that the risk has cost the defendant nothing in money because plaintiff himself was not one of those insured who died. The case is therefore one of a voidable or rescindable contract of an infant, partly performed on both sides, the benefits of which the infant has enjoyed, but which he cannot return, and where there is no charge of fraud, unfairness, or undue influence on the part of the other party, unless, as already suggested, it is to be presumed from the fact that the contract was made with an infant.

The question is, can the plaintiff recover back what he has paid, assuming that the contract was in all respects fair and reasonable? The opinion heretofore filed held that he can. Without taking time to cite or discuss any of our former decisions, it is sufficient to say that none of them commit this court to such a doctrine. That such a rule goes further than is necessary for the protection of the infant, and would often work gross injustice to those dealing with him, is, to our minds, clear. Suppose a minor engaged in agriculture should hire a man to work on his farm, and pay him reasonable wages for his services. According to this rule, the minor might recover back what he paid, although retaining and enjoying the fruits of the other man's labor. Or, again, suppose a man engaged in mercantile business, with a capital of \$5,000, should, from time to time, buy and pay for \$100,000 worth of goods, in the aggregate, which he had sold, and had got his pay. According to this doctrine, he could recover back the \$100,000 which he had paid to the various parties from whom he had bought the goods. Not only would such a rule work great injustice to others, but it would be positively injurious to the infant himself. The policy of the law is to shield or protect the infant, and not to debar him from the privilege of contracting. But, if the rule suggested is to obtain, there is no footing on which an adult can deal with him, except for necessities. Nobody could or would do any business with him. He could not get his life

insured. He could not insure his property against fire. He could not hire servants to till his farm. He could not improve or keep up his land or buildings. In short, however advantageous other contracts might be to him, or however much capital he might have, he could do absolutely nothing, except to buy necessities, because nobody would dare to contract with him for anything else. It cannot be that this is the law. Certainly, it ought not to be.

The following propositions are well settled, everywhere, as to the rescindable contracts of an infant, and in that category we include all contracts except for necessities: *First*. That in so far as a contract is executory on part of an infant, he may always interpose his infancy as a defense to an action for its enforcement. He can always use his infancy as a shield. *Second*. If the contract has been wholly or partly performed on his part, but is wholly executory on part of the other party, the minor having received no benefits from it, he may recover back what he has paid or parted with. *Third*. Where the contract has been wholly or partly performed on both sides, the infant may always rescind, and recover back what he has paid, upon restoring what he has received. *Fourth*. A minor, on arriving at full age, may avoid a conveyance of his real estate without being required to place the grantee in *statu quo*, although a different rule has sometimes been adopted by courts of equity when the former infant has applied to them for aid in avoiding his deeds. Whether this distinction between conveyances of real property and personal contracts is founded on a technical rule, or upon considerations of policy growing out of the difference between real and personal property, it is not necessary here to consider. *Fifth*. Where the contract has been wholly or partly performed on both sides, the infant, if he sues to recover back what he has paid, must always restore what he has received, in so far as he still retains it in specie. *Sixth*. The courts will always grant an infant relief where the other party has been guilty of fraud or undue influence. As to what would constitute a sufficient ground for relief under this head, and what relief the courts would grant in such cases, we will refer to hereafter.

But suppose that the contract is free from all elements of fraud, unfairness, or over-reaching, and the infant has enjoyed the benefits of it, but has spent or disposed of what he has received, or the benefits received are, as in this case, of such a nature that they cannot be restored. Can he recover back what he has paid? It is well settled in England that he cannot. This was held in the leading case of *Holmes v. Blogg*, 8 Taunt. 508, approved as late as 1890 in *Valentini v. Canali*, 24 Q. B. Div. 166. Some obiter remarks of

the chief justice in *Holmes v. Blogg*, to the effect that an infant could never recover back money voluntarily paid, were too broad, and have often been disapproved, — a fact which has sometimes led to the erroneous impression that the case itself has been overruled. *Corpe v. Overton*, 10 Bing. 252 (decided by the same court), held that the infant might recover back what he had voluntarily paid, but on the ground that the contract in that case remained wholly executory on part of the other party, and hence the infant had never enjoyed its benefits. In *Chitty on Contracts* (volume 1, p. 222), the law is stated in accordance with the decision in *Holmes v. Blogg*. Leake, — a most accurate writer, — in his work on *Contracts* (page 553), sums up the law to the same effect. In this country, Chancellor Kent (2 Kent, Comm. 240), and Reeves in his work on *Domestic Relations* (chapters 2 and 3, tit. "Parent and Child"), state the law in exact accordance with what we may term the "English rule." Parsons, in his work on *Contracts* (volume 1, p. 322), undoubtedly states the law too broadly, in omitting the qualification, "and enjoys the benefit of it."

At least a respectable minority of the American decisions are in full accord with what we have termed the "English rule." See, among others, *Riley v. Mallory*, 33 Conn. 206; *Adams v. Beall*, 67 Md. 53, 8 Atl. 664; *Breed v. Judd*, 1 Gray, 455. But many — perhaps a majority — of the American decisions, apparently thinking that the English rule does not sufficiently protect the infant, have modified it; and some of them seem to have wholly repudiated it, and to hold that although the contract was in all respects fair and reasonable, and the infant had enjoyed the benefits of it, yet if the infant had spent or parted with what he had received, or if the benefits of it were of such a nature that they could not be restored, still he might recover back what he had paid. The problem with the courts seems to have been, on the one hand, to protect the infant from the improvidence incident to his youth and inexperience, and how, on the other hand, to compel him to conform to the principles of common honesty. The result is that the American authorities — at least the later ones — have fallen into such a condition of conflict and confusion that it is difficult to draw from them any definite or uniform rule.

The dissatisfaction with what we have termed the "English rule" seems to be generally based upon the idea that the courts would not grant an infant relief, on the ground of fraud or undue influence, except where they would grant it to an adult on the same grounds, and then only on the same conditions. Many of the cases, we admit, would seem to support this idea. If such were the law, it

is obvious that there would be many cases where it would furnish no adequate protection to the infant. Cases may be readily imagined where an infant may have paid for an article several times more than it was worth, or where the contract was of an improvident character, calculated to result in the squandering of his estate, and that fact was known to the other party; and yet if he was an adult the court would grant him no relief, but leave him to stand the consequences of his own foolish bargain. But to measure the right of an infant in such cases by the same rule that would be applied in the case of an adult would be to fail to give due weight to the disparity between the adult and the infant, or to apply the proper standard of fair dealing due from the former to the latter. Even as between adults, when a transaction is assailed on the ground of fraud, undue influence, etc., their disparity in intelligence and experience, or in any other respect which gives one an ascendancy over the other, or tends to prevent the latter from exercising an intelligent and unbiased judgment, is always a most vital consideration with the courts. Where a contract is improvident and unfair, courts of equity have frequently inferred fraud from the mere disparity of the parties. If this is true as to adults, the rule ought certainly to be applied with still greater liberality in favor of infants, whom the law deems so incompetent to care for themselves that it holds them incapable of binding themselves by contract, except for necessities. In view of this disparity of the parties, thus recognized by law, every one who assumes to contract with an infant should be held to the utmost good faith and fair dealing. We further think that this disparity is such as to raise a presumption against the fairness of the contract, and to cast upon the other party the burden of proving that it was a fair and reasonable one, and free from any fraud, undue influence, or overreaching.

A similar principle applies to all the relations, where, from disparity of years, intellect, or knowledge, one of the parties to the contract has an ascendancy which prevents the other from exercising an unbiased judgment, — as, for example, parent and child, husband and wife, guardian and ward. It is true that the mere fact that a person is dealing with an infant creates no “fiduciary relation” between them, in the proper sense of the term, such as exists between guardian and ward; but we think that he who deals with an infant should be held to substantially the same standard of fair dealing, and be charged with the burden of proving that the contract was in all respects fair and reasonable, and not tainted with any fraud, undue influence, or overreaching on his part. Of course, in this as in all other cases, the degree of disparity between

the parties, in age and mental capacity, would be an important consideration. Moreover, if the contract was not in all respects fair and reasonable, the extent to which the infant should recover would depend on the nature and extent of the element of unfairness which characterized the transaction.

If the party dealing with the infant was guilty of actual fraud or bad faith, we think the infant should be allowed to recover back all he had paid, without making restitution, except, of course, to the extent to which he still retained in specie what he had received. Such a case would be a contract essentially improvident, calculated to facilitate the squandering the infant's estate, and which the other party knew or ought to have known to be such, for to make such a contract at all with an infant would be fraud. But if the contract was free from any fraud or bad faith, and otherwise reasonable, except that the price paid by the infant was in excess of the value of what he received, his recovery should be limited to the difference between what he paid and what he received. Such cases as *Medbury v. Watrous*, 7 Hill, 110; *Sparman v. Keim*, 83 N. Y. 245; and *Heath v. Stevens*, 48 N. H. 251, — really proceed upon this principle, although they may not distinctly announce it. The objections to this rule are, in our opinion, largely imaginary, for we are confident that in practice it can and will be applied by courts and juries so as to work out substantial justice.

Our conclusion is that where the personal contract of an infant, beneficial to himself, has been wholly or partly executed on both sides, but the infant has disposed of what he has received, or the benefits recovered by him are such that they cannot be restored, he cannot recover back what he has paid, if the contract was a fair and reasonable one, and free from any fraud or bad faith on part of the other party, but that the burden is on the other party to prove that such was the character of the contract; that, if the contract involved the element of actual fraud or bad faith, the infant may recover all he paid or parted with, but if the contract involved no such elements, and was otherwise reasonable and fair, except that what the infant paid was in excess of the value of what he received, his recovery should be limited to such excess. It seems to us that this will sufficiently protect the infant, and at the same time do justice to the other party. Of course, in speaking of contracts beneficial to the infant, we refer to those that are deemed such in contemplation of law.

Applying these rules to the case in hand, we add that life insurance in a solvent company, at the ordinary and usual rates, for an amount reasonably commensurate with the infant's estate, or his

financial ability to carry it, is a provident, fair, and reasonable contract, and one which it is entirely proper for an insurance company to make with him, assuming that it practices no fraud or other unlawful means to secure it; and if such should appear to be the character of this contract the plaintiff could not recover the premiums which he has paid in, so far as they were intended to cover the current annual risk assumed by the company under its policy. But it appears from the face of the policy that these premiums covered something more than this. The policy provides that after payment of three or more annual premiums the insured will be entitled to a paid-up, non-participating policy for as many twentieths of the original sum insured (\$1,000) as there have been annual premiums so paid. The complaint alleges the payment of four annual premiums. Hence, the plaintiff was entitled, upon surrender of the original policy, to a paid-up, non-participating policy for \$200; and it therefore seems to us that, having elected to rescind, he was entitled to recover back, in any event, the present cash "surrender" value of such a policy. For this reason, as well as that the burden was on the defendant to prove the fair and honest character of the contract, the demurrer to the complaint was properly overruled. The result arrived at in the former opinion was therefore correct, and is adhered to, although on somewhat different grounds.

Order affirmed.¹

BUCK, J., absent. GILFILLAN, Ch. J., concurs in result.

IN THE MATTER OF THE GLOBE MUTUAL BENEFIT ASSOCIATION.

135 N. Y. 280. — 1892

ANDREWS, J. — The order from which this appeal is taken enjoins the defendant, a co-operative life and casualty insurance association organized under the act, chapter 175 of the Laws of 1883, entitled "An act to provide for the incorporation and regulation of co-operative or assessment life and casualty insurance associations and societies," from transacting the business of infantile insurance. The order proceeds on the ground that the insurance of infants is not within the powers of corporations organized under this statute

¹ Insurance of an infant's property against fire is not a necessary and his contract therefor is not binding but voidable. *New Hampshire Mut. Fire Ins. Co. v. Noyes*, 32 N. H. 345.

and is inconsistent with the statutory scheme and the legislative intention.

The by-laws of the defendant provide that any persons between the ages of six months and seventy years, approved by the medical director, may become a member of the society. The applicant, if approved, is entitled to a certificate of membership, and on paying an entrance fee and a certain sum weekly during life, the company undertakes to pay at his death to a beneficiary designated by the member, or to the next of kin if no beneficiary is named, a certain sum called a benefit, provided there is a fund realized from voluntary donations, admission fees and dues collected, or which may be collected from members, out of which such payment can be made.

There are two classes of members, a life class and a casualty class, the distinction between which is for the present purpose of no importance. It appears from a schedule in the case that infants from one to four years of age have been admitted as members of the corporation, in whose name certificates of membership have been issued designating a beneficiary, insuring the infant named in a certain sum in one of the classes mentioned.

The first section of the act of 1883 authorizes any number of persons not less than nine, residents of the state, to associate themselves together to organize a corporation thereunder. The second section prescribes that the associates shall file in the office of the superintendent of the insurance department a declaration of their intention to form a company under the act, containing several particulars specified, to be signed and acknowledged by each of the incorporators. By the third section, upon the completion of the organization, it is declared that "said corporators and those that may thereafter become associated with them or their successors, shall be constituted a body politic and corporate." The fourth section authorizes the making of by-laws. The fifth section declares that corporations organized under the act, issuing certificates payable on the decease of a member or upon his sickness or other physical disability, or to a beneficiary, from resources derived from voluntary donations or admission fees, dues or assessments collected from members, and whose payment is conditional upon means so realized, etc., shall be deemed to be engaged in the business of life or casualty insurance upon the co-operative or assessment plan and "shall be subject only to the provisions of the act." The sixteenth section provides for the holding of an annual meeting of the members or policy-holders of the corporation, with a notice of the time and place when and where the same will be considered. The eighteenth section authorizes a member to change the beneficiary

with the consent of the corporation, and without the consent of the beneficiary.

The defendant was a co-operative association under the act, a continuing membership in which is made dependent on the member keeping up his dues. Each holder of a certificate is by virtue thereof a member and corporator of the association, and so remains until by nonpayment of dues his membership is forfeited. The statute contemplates a meeting of the associates in annual meeting, at which reports of receipts and expenditures are to be submitted, and the associates assembled at a meeting duly notified, are to consider and pass upon by-laws or amendments proposed for adoption.

It is plain that the powers conferred upon members cannot be exercised by children of tender years, such as have been permitted to become members of the corporation defendant. The children insured by the defendant, whose ages are given in the schedule, were incapable of exercising any choice in becoming members, or of appointing a beneficiary, or of exercising the powers with which members are invested by the statute. They could take no part in the co-operative scheme upon which the corporation rests, and which implies the voluntary association of persons capable of acting in the administration of the affairs of the corporation. There is nothing in the statute which permits the inference that a child may be made a member of the corporation upon the application of the parent, or that a beneficiary may be designated or changed by any person except the member himself.

It has been held that where a statute authorizes persons to form a corporation, it is implied that they shall be persons of full age. *Hamilton & Flamborough Road Co. v. Townsend*, 13 Ont. App. R. 534; 16 Am. & Eng. Corp. Cas. 645. Infants admitted as members by the defendant became members of the corporation, if legally entitled to admission, and may be elected trustees or directors, and it might happen that the management of the affairs of the corporation would become vested in persons who could not have organized it.

We place our assent to the judgment below on the ground that it appears from a consideration of the statute of 1883, and the nature and object of co-operative insurance companies, and the relation which members hold to the corporation, that adult persons only were contemplated as entitled to membership. The law fixes an arbitrary period when persons become clothed with general legal capacity, and while in many cases youths under twenty-one are capable of exercising an intelligent judgment and might properly be admitted to the advantage of membership in a company like that

of the defendant, in many others they would be wholly unfitted to act as members of such an organization.

We think the order below is right and it should be affirmed.

All concur, except O'BRIEN and MAYNARD, JJ., not sitting.

Order affirmed.¹

b. Corporations.

STATE EX REL. *v.* ACKERMAN ET AL.²

51 OHIO ST. 163. — 1894.

QUO WARRANTO by the State, on the relation of the Attorney-General, against C. F. Ackerman and ninety-nine others. Defendants demur. Demurrer overruled, and judgment of ouster.

The petition is filed against C. F. Ackerman and ninety-nine other persons, who are transacting the business of guaranty and accident insurance in this State, under the name of the "Guarantee and Accident Lloyds, New York," to oust them from the carrying on of that business, because they have not complied with the laws of the State, or received any authority from it to do a business of that kind.

WILLIAMS, J. — The action of quo warranto may be maintained, under our statute, (1) against a person who unlawfully exercises a franchise, and (2) against an association of persons who act as a corporation within the State without being legally incorporated; and the present action is prosecuted on both of these grounds. The position taken in support of the demurrer is that the defendants, in transacting the business of insurance in the manner alleged in the petition, do not exercise a franchise, or act as a corporation, but are pursuing, as individuals, an occupation in which any person may of natural and common right engage; which right, it is contended, cannot be abridged or controlled by legislation, and hence the defendants are not subject to the conditions and regulations imposed by the laws of the State on companies and associations doing an insurance business. Insurance, in its early existence, when the nature of the risks assumed were few, and the amount of business small, was done chiefly, if not entirely, by individuals. But in more recent times it has been extended until it embraces almost every

¹ But see *Chicago Mutual Life Assoc. v. Hunt*, 127 Ill. 257, where it was held that the admission of minors to membership was not sufficient ground for dissolving the association.

² This case also serves to illustrate generally the extent and nature of State control over insurance business.

kind of risk, and has grown to such proportions that it enters into every department of business, and affects all classes of people, and their property; and has, in consequence, everywhere become the subject of legislative regulation and control. The several States have enacted laws designed to place the business, within their limits, on such substantial basis as will afford adequate protection to the citizens and their property. There can be no doubt of the power of the State to do so; nor that the power extends to the enactment of such laws as its legislative body may deem wise and proper for the purpose, not in conflict with the fundamental law; and therefore, within the legitimate exercise of that power, foreign companies may be excluded altogether from doing business in the State, or admitted on their compliance with such terms and conditions as its Legislature chooses to impose. There has been enacted in this State an extensive code or system of laws, covering the whole subject of insurance, regulating the incorporation and organization of companies and associations for the transactions of the various kinds of insurance, and prescribing their powers and duties, defining the scope and effect of their policies, and otherwise regulating their business. They are required, as a means of protection of those who deal with them, to deposit adequate securities, and invest their capital and earnings in designated modes, in the State, make periodical reports of their financial condition and business affairs, submit to visitations, and examinations of their affairs, by a public officer charged with the duty of enforcing the insurance laws, and comply with other specified requirements; a compliance with all of which, by companies and associations organized in the State, is essential to their right to carry on the business. Foreign companies, before doing business in the State, are required to conform to the same regulations, and others peculiarly applicable to them; among which latter are those which prohibit any "insurance company, association, or partnership, incorporated, organized, or associated under the laws of any other of the United States, or of any foreign government," from doing an insurance business "in this State, until it procures from the superintendent a certificate of authority to do so," and forbid any person or corporation to "act as agent in this State for any such company, association, or partnership, directly or indirectly, either in procuring applications for insurance, taking risks, or in any manner transacting the business of insurance, until it procures from the superintendent a license to do so, stating that the company, association, or partnership has complied with all the requirements of "the insurance laws" applicable to such company, and depositing a certified copy of such license in the office of the

recorder of the county in which the office or place of business of such agent or agents is established." Rev. St. § 3656.

The chapter of the Revised Statutes which establishes the department of insurance, and places it under the management of the Superintendent, provides, among other things, that that officer shall be appointed by the Governor, by and with the advice and consent of the Senate. He holds his office for a fixed period, and is paid a stated salary; he is provided with an office in the state-house, and is specifically charged with the duty of seeing to the execution and enforcement of all laws relating to insurance. He is authorized to investigate the business and affairs of all insurance companies, whether foreign or domestic, and employ skilled and competent persons to assist him. It is made his duty when he has reason to suspect that the affairs of any company are in an unsound condition, to cause them to be investigated, and its officers and agents are required to submit themselves to examination under oath, and their books and business to his inspection, and in every other way facilitate the investigation; and, when satisfied the company is in an unsound condition, his duty is to revoke its authority to do business, and from his decision there is no appeal. *State v. Moore*, 42 Ohio St. 103. He must keep a record, and preserve in permanent form his proceedings, including a concise statement of the conditions of each company, and make reports to the Legislature of the conduct and condition of each company doing business within the State, with such suggestions as he may deem expedient. In short, his department is a branch of the State government, and his functions are derived from the State, and exercised in the public interest. Every insurance company, before commencing business, is required to pay into the department certain fees and charges for filing its charter, and others for filing its preliminary statement for admission, and for its certificate of authority to do business, and for licenses to its agents; and, after the company commences business, it "shall publish, at least once a year, in some newspaper of general circulation, in every county where such company has an agent, a certificate from the superintendent of insurance that such company has, in all respects, complied with the laws of the State relating to insurance." It is made unlawful for any person, company, or corporation not licensed by the Superintendent of Insurance to receive or forward applications for insurance in any foreign company, or in any manner aid in the transaction of its business; and severe penalties are attached to the violation of any of the provisions of the chapter which provides for the appointment of the Superintendent, including those already pointed out, all of which

are made applicable, expressly, "to individuals and parties, and to all companies and associations, whether incorporated or not, now or hereafter engaged in the business of insurance;" and it is further made unlawful for any "company, corporation, or association, whether organized in this State or elsewhere, either directly or indirectly, to engage in the business of insurance, or to enter into any contracts substantially amounting to insurance, or in any manner to aid therein, in this State, without first having complied with all the provisions of this chapter." Rev. St. § 289. These are some of the many statutory provisions, showing the extent to which the State has taken control of the business of insurance. They are reasonable and just, and were adopted for the laudable purpose of protecting the public against imposition by unreliable and untrustworthy companies and associations. Compliance with them is made the condition upon which foreign companies and associations are allowed to transact the business of insurance within the State. There is not such compliance until the company or association has obtained from the Superintendent of Insurance the necessary certificate of authority, and licenses to its agents. Companies and associations that have not received such certificate are denied the privilege of doing business here. The certificate of authority so granted by the Superintendent, so long as it remains in force, confers on the company or association receiving it the right and privilege of carrying on its business of insurance in the State. The authority emanates from the State, and the privilege granted is a franchise.

The author of a recent and well prepared work, treating of this subject, says: "Where by statute the legal exercise of a right, which at common law was private, is made to depend upon compliance with conditions interposed for the security and protection of the public, the necessary inference is that it is no longer private, but has become a matter of public concern, — that is, a franchise, the assumption and exercise of which, without complying with the conditions prescribed, would be a usurpation of a public or sovereign function. In this case the Legislature has done no more than was done by the court in the other instance, when it, from considerations of a public nature, declared, as a principle of the common law, that facts brought to its notice, or of which it then took judicial notice, warranted the application of principles existing independently of the legislative declaration to the effect that the right claimed was matter of public, and not exclusively of private, concern." Spelling, Extraordinary Relief, § 1807. The same author further says: "There was no class of business the transaction of which, as a matter of private right, was better recognized at common

law than that of making contracts of insurance upon the lives of individuals. But now, by statute, in almost, if not quite, all the States, stringent requirements as to security of the persons dealing with insurers, and the making and filing reports with public officers for public information, are provided, and must be strictly observed and complied with before any person, association, or corporation may make any contract of life insurance. The effect of such statute is to make that a franchise which previously had been a matter purely of private right." *Id.* § 1808.

It is claimed, however, that the laws of Ohio do not apply to the defendants, because they are not an organized corporation, company, or association, or acting as such, but that, in making contracts of insurance, each individual acts for himself. A careful consideration of their plan of business, as shown by the articles of agreement and powers of attorney executed by the defendants, has brought us to a different conclusion. They have associated themselves together, in a business undertaking, under a company name, in which, viz.: "Guarantee and Accident Lloyds, New York," all of their policies are issued. Each subscriber to the articles has contributed an equal amount to the capital stock of the concern, which is placed in the control of a board of managers, called an advisory committee, to meet losses arising on the policies. This board of managers is chosen by the subscribers, like the directors of a corporation, and invested with powers quite as plenary. All the subscribers have executed powers of attorney to the same individuals, investing them with the business management of the insurance, under the supervision of the advisory board. The powers conferred on the attorneys in fact are analogous to those of the executive officers of a corporation. They execute the policies, keep accounts of the business and expenses, which are open to the inspection of the advisory board, adjust all losses, and prosecute and defend all suits growing out of the business. Each member of the association stipulates with the others that no policy shall be issued unless it is executed in behalf of all, and yet that his liability shall be several only, and limited to the amount contributed to the fund, or authorized by him; so that, if some of the members become insolvent, and their contribution is exhausted in losses, or otherwise, the policy shall be enforceable against the others only for an aliquot part, equal to the proportion of the solvent to the insolvent members. The liability of a stockholder of a corporation is not more restricted. Then the interest of each member in the concern is made transferable; a member who wishes to withdraw is

authorized to procure another to take his place, and the representative of a deceased member may transfer the latter's share in like manner, and, in that way, the organization may be made as enduring as it is possible for any corporation to be. The association has the appearance, and some of the characteristics, of a corporation formed for the purpose of doing a general insurance business in its line, and its form of policies and mode of conducting its business are calculated to impress one who does not make a critical examination, with the belief that it is a corporation, conforming to the usages of such companies. The character of the organization under which the defendants are operating, and their method of business, bring them, we think, within the purview of that clause of section 6760 of the Revised Statutes which authorizes an action in quo warranto to be brought "against an association of persons who act as a corporation within this State without being legally incorporated." To be within the operation of that provision, it is not necessary that the association, or persons composing it, avow a purpose to act as a corporation; or assume to do so; it is sufficient that the acts are such as appertain to corporations, or are done after the manner of corporations.

Under a statutory provision identical with that of section 6760, quoted above, it was held by the Supreme Court of Illinois that "an association, or number of persons, who, in conducting the business of insurance, profess to limit their liability to the amount of money contributed by each, and assume to give perpetuity to the business by making membership certificates transferable by the assignment of the member, or his personal representatives, are 'acting as a corporation,' so as to authorize a judgment of ouster in quo warranto under Rev. St. Ill. 1874, c. 112, where they are not legally incorporated." *Greene v. People*, 21 N. E. 605. The case is much in point; and we fully concur in the doctrine announced by Scholfield, J., in the opinion, where it is said: "The question here is whether, under the facts presented by this record, 'any association or number of persons are acting, within this State, as a corporation, without being legally incorporated.' If they are, the judgment below is authorized by our statute entitled 'quo warranto' (chapter 112, Rev. St. 1874, p. 787), and must be affirmed; otherwise it must be reversed. We think it clear that, in two respects at least, these respondents are acting as a corporation, and it is not pretended that they are actually incorporated, namely: First, in professedly limiting their liability to the amount of money contributed by each; second, in assuming to give perpetuity to the business by making membership certificates transferable by the assignment of the mem-

ber or his personal representative. It may be, as contended by counsel, that individuals may insure property against loss by fire. They cannot limit their liability to any given amount of capital they choose to set apart for that purpose, nor can they perpetuate the business without change of capital, beyond their own lives indefinitely. These things can only be done by a corporation. Ang. & A. Corp. (9th Ed.) § 41; 2 Kent, Comm. (8th Ed.) 296, 298; Pars. Partn. (2d Am. Ed.) 544; Gow, Partn. (2d Am. Ed.) 17. The fact that these respondents may be legally held individually liable upon any policies they may have issued does not relieve them of the charge of having acted as a corporation. They are, if individually liable, only liable because they have no statutory authority to do what they have assumed to do, because, instead of being a corporation in fact, they have usurped the powers of a corporation. Were we to hold that these respondents can do, without any legislative authority, what they here assume to do, our insurance laws ought to be repealed; for individuals, then, by organizing in this manner, could escape both individual and corporate liability beyond the amount of assets they might choose to place in the hands of their trustee as the basis of their liability. No public officer could investigate whether the amount is in fact paid in, how it is invested, or how secured, and the public would thus have practically no protection against dishonest companies. These respondents, if they will carry on the business of insurance, must either openly act upon their responsibility, as individuals, or they must become incorporated, and subject themselves to the laws governing such corporations." The judgment below was accordingly affirmed.

The grounds held sufficient for ousting the respondents in that case are present in the case before us. The averments of the petition sufficiently show that the defendants, in transacting the business of insurance in this State, are unlawfully exercising a franchise within the State, and are acting as a corporation therein, without being legally incorporated.

Demurrer overruled, and judgment of ouster.¹

¹ LEGISLATIVE LIMITATION OF THE INSURANCE BUSINESS TO CORPORATIONS ONLY. Such limitation is declared constitutional in *Commonwealth v. Vrooman*, 164 Pa. 306. The court concludes: "It [the act of 1870] does not prohibit the business of insurance, but regulates it. It says to all persons interested: 'If you wish to embark in this business, you must secure a charter of incorporation, so as to subject your business to the visitatorial power of the state. If you will not do this, you must not engage in insurance against fire at all.' This is not prohibition of the business, for the business is distinctly authorized. It is an effort to bring it under State supervision and control, by requiring all who

II. INSURABLE INTEREST.

a. Insurable Interest in Property.

CREED ET AL. v. SUN FIRE OFFICE.

101 ALA. 522. — 1893.

COLEMAN, J. — This is an action by appellants upon a policy of insurance issued for the benefit of plaintiffs, insuring a certain dwelling against loss or destruction by fire. The suit is in the joint name of Katie Creed and Mattie Flinn, the assured. The defendant pleaded several special pleas, upon some of which issue was joined, and to the others a replication was filed by plaintiffs. The court sustained a demurrer to the replication, and, the plaintiffs declining to plead further, judgment was rendered for the defendant. * * *

The next proposition involves a question new in this State. Has a creditor an insurable interest in a building, the property of the estate of his deceased debtor which may be subjected to his debt, the personal property being insufficient to pay the debts of the estate? After much deliberation, our conclusion is that he has an interest which may be insured. We concede and affirm that a simple contract creditor, without a lien, either statutory or contract, without a *jus in re* or a *jus ad rem*, owning a mere personal claim against his debtor, has not an insurable interest in the property of his

wish to enter the business to put themselves in a position where the insurance legislation of the State will reach them, and the insurance department of the State can supervise their business and compel observance of the law. Without going further into the discussion, we may now state our conclusions applicable to the case before us: First. The business of insurance against loss by fire is, by reason of its magnitude, its importance to property owners, and the nature of the business, a proper subject for the exercise of the police power of the State. Second. The act of 1870 is a valid exercise of the police power. It does not prohibit, but regulates, the business. It excludes no one from engaging in it, but prescribes the preliminary qualification necessary for all alike to entitle them to enter the business. Third. The qualification is reasonable. It is open to all under general laws. It is not burdensome. Its only effect is to secure adequate capital at the beginning, and State supervision during the continuance of the business. Fourth. Upon the special verdict, judgment should have been entered in favor of the Commonwealth, and sentence should have been pronounced under the act of 1870. That this may now be done, the judgment is reversed, the record remitted, and a *procedendo* awarded." DEAN, J. (with whom concur STERRETT, C. J., and GREEN, J.), dissents, the conclusion of his opinion being as follows: "If the exercise of the right of contract to indemnify be injurious to the public, then it ought to be prohibited; if beneficial, it ought not to be monopolized by a few * * * while a business affected by a public

debtor. Such contracts are void, as being against public policy. We do not think the principle applies after the death of the debtor, as to property liable for the debt, and which, if destroyed, will result in the loss of the debt. The real estate as well as personal property of a deceased debtor is liable for his debts, but the real estate cannot be subjected to the payment of his debts until after the personalty has been exhausted. After the death of the debtor the debt is no longer enforceable *in personam*. The proceedings to reach the property of the estate of the deceased debtor are *in rem*. The property of the debtor takes the place of the debtor, and becomes, as it were, the debtor. Whoever knowingly receives the property of a deceased debtor, and wrongfully converts it is answerable to the creditor. 3 Brick. Dig. p. 464, § 148; Id. p. 465, § 162. The relation of creditor and debtor invests the creditor with an insurable interest in the life of his debtor to the extent of his debt. *Alexander v. Sanders*, 93 Ala. 345, 9 South. 521; 11 Am. & Eng. Enc. Law, 319. It would seem upon like principles that, when the property becomes directly subject to proceedings *in rem* for the satisfaction of the debt, the creditor should become invested with an insurable interest in the property. Certainly, if a creditor cannot obtain satisfaction of his debt from the personal property of his deceased debtor, and has a legal right, which cannot be defeated, to enforce its collection by proceedings *in rem* against a building belonging to the estate of the deceased debtor, and if it be true

interest may be regulated, yet when not inimical to the health, morals, or safety of the people, it cannot be prohibited. I do not think an exclusive grant to a class is regulation. That is prohibition of all others, and is therefore unconstitutional."

RETALIATORY LEGISLATION. Some States have legislative acts providing in substance that an insurance corporation of another State seeking to do business in such States shall pay for taxes, fees, etc., an amount equal to that imposed by the State of its origin, upon insurance corporations of such other States. In New York this legislation was held constitutional when attacked upon the ground that (1) it was an unlawful delegation of the legislative power, by remitting to another State the enactment of tax laws, and (2) that the legislation violated the Federal Constitution, by denying to a person within the jurisdiction of the State, the equal protection of the laws. *People v. Fire Assoc. of Phila.*, 92 N. Y. 311. *Contra*, *Clark v. Mobile*, 66 Ala. 217. The New York case is affirmed as to the second point in *Phila. Fire Assoc. v. New York*, 119 U. S. 110.

INSURANCE AS INTERSTATE COMMERCE. State regulation of insurance corporations doing business in two or more States is not in conflict with that clause of the Federal Constitution which declares that Congress shall have power to "regulate commerce with foreign nations and among the several States." Insurance policies are contracts, and "are not not articles of commerce in any proper meaning of the word." *Paul v. Virginia*, 8 Wall. 168.

that the destruction of the building by fire would immediately and necessarily result in pecuniary loss, the loss being the direct consequence of the fire, the creditor has an interest in the protection of the building. He has no lien as in the case of a mortgagee nor such lien as the statute may confer on an attaching or execution creditor; but his right to subject the specific property to his debt invests him with an interest but little less, if any, than that of the attaching or execution creditor or mortgagee. In the case of *Herkimer v. Rice*, 27 N. Y. 163, the question arose as to whether an administrator of an insolvent estate held an insurable interest in the real estate of the deceased debtor. The court (Denio, C. J., rendering the opinion) held that he did, and the conclusion was based in great part upon the proposition, that the creditors had such an interest which the administrator could protect by insurance for them. We think whatever could be done by an administrator for the creditor in this respect could be done directly by the creditor for himself. *Rohrbach v. Insurance Co.*, 62 N. Y. 47. Other reasons might be given, but we are of the opinion these are sufficient to show that the creditor of a deceased debtor, whose estate is insufficient to pay the debts, has an insurable interest in the property of the estate, which by law may be subjected by proceedings *in rem* to the payment of the debts. The recovery cannot exceed the amount of the insurable interest.

The next question is whether the pleadings show such an insurable interest. The pleas and the replication appear to have been drawn with technical caution, so far as the rights of Mattie Flinn, the creditor, are affected. The plea shows that the building and lot upon which it is located belonged to the estate of Thomas Creed, deceased, and that neither of the assured are his legal heirs. Upon the death of Thomas Creed the land descended to his legal heirs. *Prima facie*, upon the facts of the plea, the insured owned no insurable interest. The replication avers that Katie Creed was the widow of Thomas Creed, and that he owned no other real estate, and this statement of facts is followed with the conclusion that she owned a dower and homestead interest. Hers was clearly an insurable interest. Its value is a fact to be ascertained by proof. The replication then further averred that Mattie Flinn was a creditor of Thomas Creed, stating the amount of her claim, the insufficiency of personal assets to pay the debts, and that there was no other real property belonging to his estate. The interest shown by the plea to be in Katie Creed (dower and homestead) does not include the entire estate. Under the replication there is a remainder interest in the real estate liable for the

debts of the estate. The pleadings inform us that the lot and building were in the city of Montgomery. Whether it exceeded in value \$2,000, the constitutional limit of the value of the homestead exempt from debts during the lifetime of the widow, does not appear. We are not unmindful of the statutory provision by which, under some circumstances, the fee to the homestead may become vested in the widow and minor children or widow or minor child. The consideration of these questions does not arise upon the pleadings. The court erred in sustaining the demurrer to the replication.

Reversed and remanded.¹

RIGGS *v.* COMMERCIAL MUTUAL INS. CO.

125 N. Y. 7. — 1890.

ACTION by John S. Riggs against the Commercial Mutual Insurance Company. Defendant issued to Joseph L. Tobias a policy of insurance upon the steamer *Falcon* for \$1,000, loss payable to Andrew Simonds. Tobias was, at the time of effecting this insurance, a stockholder in the Merchants' Steamship Company, which then owned the steamers *Sea Gull* and *Falcon*. Simonds, by an indorsement on the policy, directed the insurance company to "pay to John S. Riggs."

¹ "But the result of a comparison of the text writers above cited is that there need not be a legal or equitable title to the property insured. If there be a right in or against the property, which some court will enforce upon the property, a right so closely connected with it, and so much dependent for value upon the continued existence of it alone, as that a loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest. Thus a mortgagee of real estate, though he hold also the bond of the mortgagor, has an insurable interest in the buildings; while a judgment creditor of the same mortgagor, his judgment being a lien upon the same real estate and the same buildings, is said not to have an insurable interest in them. The interest of the first is said to be specific, the interest of the latter, general. As a general rule, the distinction may be sound. But I think it would be difficult to show an appreciable practical difference in the pecuniary result to the two. If the mortgagor and judgment debtor should die leaving no personal property, and no real estate save that mortgaged, it principally valuable for the buildings upon it, and they should be burned, each must then look to the real estate, the lands alone, for a security for his debt; and if that be insufficient, each must with equal certainty, suffer a pecuniary disaster, resulting directly from the fire. What legal reason is there, why the one may not, as well as the other, protect himself by a contract of insurance?" *Rohrbach v. Ins. Co.*, 62 N. Y. 47, 54.

ANDREWS, J. * * * The question whether a stockholder in a corporation, as such, has an insurable interest in the corporate property, which he may protect by an insurance of specific, tangible property of the corporation, is the question now presented. The policy does not disclose the nature of the interest of Tobias in the vessel insured; but this was not necessary, unless required by some condition in the policy. *Lawrence v. Van Horne*, 1 Caines, 276; *Tyler v. Insurance Co.*, 12 Wend. 507. The policy, if otherwise valid, attached to whatever insurable interest he had, whether as owner or otherwise. What constitutes an insurable interest has been the subject of much discussion in the cases, and is often a question of great difficulty. It is quite apparent that the tendency of decisions in recent times is in the direction of a more liberal doctrine upon this subject than formerly prevailed. May, Ins. § 76. Contracts of insurance where the insured had no interest were permitted at common law (*Craufurd v. Hunter*, 8 Term R. 13); but the manifest evils attending such contracts, and the temptation which they afforded for fraud and crime, led to the enactment in England of the statute 19 Geo. II. c. 37, prohibiting wager policies, and this was followed by the enactment in this State of a similar statute (1 Rev. St. 662) prohibiting wagers. But to prevent the application of the statute to cases of insurance by way of security and indemnity it was provided that it should "not be extended so as to prohibit or in any way affect any insurances made in good faith for the security or indemnity of the party assured, and which are not otherwise prohibited by law." Section 10. It would seem, therefore, that whenever there is a real interest to protect, and a person is so situated with respect to the subject of insurance that its destruction would or might reasonably be expected to impair the value of that interest, an insurance on such interest would not be a wager within the statute, whether the interest was an ownership in or a right to the possession of the property, or simply an advantage of a pecuniary character, having a legal basis, but dependent upon the continued existence of the subject. It is well settled that a mere hope or expectation, which may be frustrated by the happening of some event, is not an insurable interest.

The stockholder in a corporation has no legal title to the corporate assets or property, nor any equitable title which he can convert into a legal title. The corporation itself is the legal owner, and can deal with corporate property as owner, subject only to the restrictions of the charter. *Plimpton v. Bigelow*, 93 N. Y. 593; *Van Allen v. Assessors*, 3 Wall. 573. But stockholders in a corporation have equitable rights of a pecuniary nature, growing out of their

situation as stockholders, which may be prejudiced by the destruction of the corporate property. The object of business corporations is to make profits through the exercise of the corporate franchises, and gains so made are distributable among the stockholders according to their respective interests, although the time of the division is ordinarily in the discretion of the managing body. It is this right to share in the profits which constitutes the inducement to become stockholders. So, also, on the winding up of the corporation, the assets, after payment of debts, are divisible among the stockholders. It is very plain that both these rights of stockholders — viz., the right to dividends and the right to share in the final distribution of the corporate property — may be prejudiced by its destruction. In this case the ships were the means by which profits were to be earned, and their loss would naturally, in the ordinary course of things, diminish the capacity of the corporation to pay dividends, and consequently impair the value of the stock. The same would be true in other cases which might be mentioned; as, for example, where buildings producing rent, owned by a corporation, should be burned. It is not necessary, to constitute an insurable interest, that the interest is such that the event insured against would necessarily subject the insured to loss. It is sufficient that it might do so, and that pecuniary injury would be the natural consequence. *Cone v. Insurance Co.*, 60 N. Y. 619.

The question now before us was considered by the Supreme Court of Iowa in the case of *Warren v. Insurance Co.*, 31 Iowa, 464. The court, in a careful opinion, reached the conclusion that a stockholder in a corporation had an insurable interest in the corporate property. In *Philips v. Insurance Co.*, 20 Ohio, 174, there is an adverse *dictum*, but the decision went on another ground. In *Wilson v. Jones*, L. R. 2 Exch. 139, the action was upon a policy in favor of the plaintiff, a shareholder in the Atlantic Telegraph Company, a company organized to lay the Atlantic cable. The court construed the contract as an insurance of the plaintiff in respect to the adventure undertaken by the company to lay the cable, and it was held that his interest as shareholder was an insurable interest, and likened it to an insurance on profits. (See, also, *Paterson v. Harres*, 1 Best & S. 336.) It is difficult to perceive any good reason why, if a stockholder could be insured on his shares in a corporation against a loss happening in the prosecution of a corporate enterprise, he could not insure specifically the corporate property itself embraced in the adventure, and prove his interest by showing that he was a shareholder.

The question here is, did the plaintiff have an insurable interest

covered by the policy? The amount of damages is not in question. Except that the parties have taken that question out of the controversy, the extent of the loss would be a question of fact to be ascertained by proof, and the recovery up to the amount insured would be measured by the actual loss. We are of opinion that the view that a stockholder in a corporation may insure specific corporate property by reason of his situation as stockholder, stands upon the better reason, and also that it is in consonance with the current of authority defining insurable interests in our courts. The cases of *Herkimer v. Rice*, 27 N. Y. 163; *Rohrbach v. Insurance Co.*, 62 N. Y. 47, and *National Filtering Oil Co. v. Citizens' Ins. Co.*, 106 N. Y. 535, 13 N. E. Rep. 337, sustained policies upon interests quite as remote as the interest now in question. It would be useless reiteration to restate the particular facts and grounds of the decisions in these cases. It is sufficient to refer to them, and to say in conclusion that it seems to us, both upon authority and reason, that the insurance now in question is not a wager policy, but is a fair and reasonable contract of indemnity, founded upon a real interest, though not amounting to an estate, legal or equitable, in the property insured.

The judgment should therefore be affirmed. All concur.

HARRISON *v.* PEPPER.

166 MASS. 288. — 1896.

BILL in equity to compel defendant to place the sum received by her for insurance on premises, of which she was the life tenant, in trust for plaintiff, as remainderman, until decease of defendant, with income payable to defendant during life. Defendant demurred. Demurrer sustained. Plaintiff appealed.

MORTON, J. — The defendant, as life tenant, had an insurable interest in the property; and although it is alleged in the bill that she renewed the insurance on the building in her own name "as an entirety of estate, without qualification, * * * for the sum of twelve hundred dollars," and that that sum was paid to her as the full value of the dwelling-house, without any deduction by reason of the plaintiff's ownership in fee, it is not alleged that the sum so paid exceeded the value of the defendant's interest, or what the value of the defendant's interest was. If the amount received by the defendant did not exceed the value of her interest, then it is clear that the plaintiff has no right in equity to any portion of it. *Reitenbach v. Johnson*, 129 Mass. 316; *Martineau v. Kitching*, L. R. 7 Q. B. 436;

Stilwell v. Staples, 19 N. Y. 401. But if we assume that the sum paid is equal to the total value of the dwelling-house, and exceeds the value of the defendant's interest, and that the bill finally alleges this, still we do not think that the plaintiff is entitled to recover. A tenant for life is liable for any unauthorized act which tends to the injury of the inheritance; in other words, for voluntary waste. How far and under what circumstances he is liable for what is termed permissive waste is not altogether clear, and we need not consider. *In re Cartwright (Avis v. Newman)*, 41 Ch. Div. 532; *Leake, Land*, 92; *Pollock Torts*, 285, 286; *Taylor Landl. & Ten.* (7th Ed.) § 688; *Kerr, Inj.* (1st Ed.) 252. We have been referred to no case in which it has been decided that the neglect of the life tenant to insure is to be regarded as in the nature of voluntary or permissive waste, though it has been held that the failure to pay taxes is (*Stetson v. Day*, 51 Me. 434); but that, manifestly, stands upon different ground.

It is plain that the plaintiff is not entitled to recover unless she has some claim upon the funds in the hands of the defendant. In the absence of anything that requires it in the instrument creating the estate, or of any agreement to that effect on the part of the life tenant, we think that the life tenant is not bound to keep the premises insured for the benefit of the remainderman. Each can insure his own interest, but, in the absence of any stipulation or agreement, neither has any claim upon the proceeds of the other's policy, any more than in the case of mortgagor and mortgagee, or lessor and lessee, or vendor and vendee. *Burlingame v. Goodspeed*, 153 Mass. 24, 26 N. E. 232; *Trust Co. v. Boardman*, 149 Mass. 158, 21 N. E. 239; *Insurance Co. v. Boyden*, 9 Allen, 123; *Warwick v. Bretnall*, 23 Ch. Div. 188; *Leeds v. Cheetham*, 1 Sim. 146; *Rayner v. Preston*, 18 Ch. Div. 1; *Kearney v. Kearney*, 17 N. J. Eq. 59, 71. The contract of insurance is a personal contract, and inures to the benefit of the party with whom it is made, and by whom the premiums are paid. It is a contract of indemnity against loss. The sum paid "is in no proper or just sense the proceeds of the property." *Lerow v. Wilmarth*, 9 Allen, 382, 385; *Insurance Co. v. Boyden*, Id. 123; *Wilson v. Hill*, 3 Metc. (Mass.) 66; *King v. Insurance Co.*, 7 Cush. 1; *Insurance Co. v. Lawrence*, 10 Pet. 507, 512.

It is not averred, and does not appear, that the defendant intended to make a present of the proceeds of the policy to the plaintiff, or was insuring for her benefit. Whether the amount of indemnity received by the defendant for her loss was more or less than the value of her interest cannot affect the plaintiff. Nor can the defendant be converted into a trustee for the plaintiff by the mere fact

that the amount which she received was equal to the full value of the house. It was paid to and received by her as indemnity for the loss which she had sustained, and, as already observed, does not stand in the place of the property insured. In *Welsh v. Assurance Co.*, 151 Pa. St. 607, 617, 25 Atl. 142, relied on by the plaintiff, there was evidence that the life tenant intended to insure for the benefit of herself and the remainderman. The plaintiff argues that sound public policy requires that money received by a life tenant on a total loss by fire should be used in rebuilding, or should go to the remainderman reserving the interest to the life tenant for life. This argument proceeds on the assumption that the proceeds of the insurance take the place of the property insured — a view which, as we have seen, is contrary to our own and other decisions. We think that the decree dismissing the bill, with costs, should be affirmed, and it is so ordered.¹

TRADE INSURANCE COMPANY v. BARRACLIFF.

45 N. J. L. 543. — 1883.

DIXON, J. — Upon a policy of fire insurance issued by the defendant to the plaintiff this action was brought in the Supreme Court, tried in the Cumberland Circuit, where the plaintiff obtained a verdict, and removed by writ of error to this court. The assignments of error relied on all relate to exceptions taken at the trial. * * *

The fourth exception is to the charge of the judge, that the plaintiff had an insurable interest in the property and could recover for the whole damage occasioned by the fire, not exceeding the amount of the insurance.

The property insured consisted of the buildings and stock upon a farm whereon the plaintiff with his family resided. The title of the

¹ In the case of *Annelly v. DeSaussure*, 26 S. C. 505, an insurance policy taken out by one tenant in common was held not to inure to the benefit of the co-tenant. One tenant in common is not in any sense a trustee for his co-tenant, and has no insurable interest in his share of the property. A life tenant, on the other hand, is a trustee for the remainderman, and is certainly liable for loss by fire caused by his negligence. He ought not to be allowed to put himself in a position in which he would have no motive for proper care of the estate by having a policy of fire insurance by which, in case of loss, he could substitute the full fee simple value of the buildings in place of his interest for life. We therefore think that a sound public policy requires that any money collected by a life tenant on a total loss by fire should be used in rebuilding, or should go to the remainderman, reserving the interest for life for the life tenant. — *Clyburn v. Reynolds* 31 S. C. 91, 118.

property, both real and personal, was vested in his wife, but he had the possession and enjoyment of it as the head of his household. The plaintiff and his wife had had living offspring of their marriage. The insurance was effected by the plaintiff with the authority of his wife, and the agent of the company who made the contract knew that the wife was the owner, at least of the realty. These are the facts upon which the validity of the exception is to be determined.

* * * I think it is clear that in the case before us the plaintiff had an insurable interest in both the personal and real property of his wife. Of the personalty, he had the actual possession and enjoyment, and also a reasonable expectation of these pecuniary advantages as lawful incidents of his wife's ownership and his marital relations with her. His interest was such that, even in criminal pleading, framed to convict one of the larceny of the goods, he might be described as their owner. *Petre v. State*, 6 Vroom 64. In the realty he had not only these same benefits, but also an inchoate right of curtesy. He was not, indeed, tenant by the curtesy initiate, since the act of 1852 prevented his acquisition of that estate (*Porch v. Fries*, 3 C. E. Green, 204), but by the birth of offspring he had obtained an inchoate right which, on his wife's death, he surviving, would bloom into a freehold. *Ross v. Adams*, 4 Dutcher, 160. Such present benefits, coupled with such prospective rights, come easily within the definition of an insurable interest. Accordingly, when we seek for adjudications on these very points, we find them almost uniformly supporting the right to insure. Thus, in *Goulstine v. Royal Ins. Co.*, 1 F. & F. 276, Chief Baron Pollock ruled that a husband had an insurable interest in goods settled to his wife's separate use, but in their joint possession as the furniture of their home, and could recover for their loss under a policy issued to himself alone. In *Clark et ux. v. Firemen's Ins. Co.*, 18 La. 431, it was decided that a policy taken out by the husband on furniture belonging to his wife, but used in their dwelling, was valid. In *Cohn v. Virginia Ins. Co.*, 3 Hughes C. Ct. 272, the husband's right of using his wife's goods was said to be an insurable interest, although a verdict for the plaintiff was set aside for want of a proper description of that interest in the policy and declaration. An opposite view seems to have been entertained in *Agricultural Ins. Co. v. Montague*, 38 Mich. 548, where a husband had procured insurance on his wife's silverware; but the report does not indicate whether the husband had any possession or use of the property, and the decision rested on the invalidity of the policy, because the wife's title was not set out in the policy as the contract required. So as to the wife's realty. In *Franklin Ins. Co. v. Drake*, 2 B.

Mon. 47, the husband was substantially a tenant by the curtesy initiate of his wife's lands, and it was held that he had an insurable interest, and that, having such interest, he was entitled to recover the whole value of the property destroyed, without regard to the value of his personal interest, the court saying that the amount of recovery depends on the interest intended to be insured. In *Merrett v. Farmers' Ins. Co.*, 42 Iowa, 11, a husband had taken out a policy in his own name on a building erected by his wife before marriage, on land in which she had only a life estate, but which was used by both as a homestead, and it was held that he had an insurable interest by reason of his possession, and that he could recover for the whole damage, because the policy, by providing that the amount of loss was to be estimated according to the actual cash value of the property at the time of the loss, indicated that the insurance was intended to cover the entire injury. The court said: "If the holder has an insurable interest, no inquiry is made as to the value of that interest, * * * to limit the obligation of the underwriters. The rule may be different in the case of mortgagees and lienholders." In *Harris v. York Mut. Ins. Co.*, 50 Pa. St. 341, the husband's interest was precisely like that of the present plaintiff; he had an inchoate right of curtesy and was in occupation of the building insured as the dwelling of himself and wife. The policy and the action were in his own name, and they were sustained, both because of his own interest and because of his implied agency for his wife; Woodward, C. J., saying on this latter point: "When a husband has effected an insurance on houses in the joint possession of himself and wife, but which belong to her, the law will presume her ratification of his act, if not her precedent authority to perform it, and will support the insurance for her benefit." To like effect are *Mut. Ins. Co. v. Deale*, 18 Md. 26, and *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533, and Mr. Phillips approves the doctrine that a husband having a right to tenancy by the curtesy in the event of his surviving his wife, has an insurable interest in her real estate. Phillips on Ins. § 350.

Having thus, then, concluded that the plaintiff had an insurable interest at the making of the contract and at the time of the loss, the next question is as to the amount of recovery. And on this point it will not be necessary to go so far as some of the cases already cited, and say that no inquiry into the interest of the assured will be permitted; but I think this principle may be justly laid down that the amount to be recovered will depend, not on the loss happening to the individual interest of the assured, but on the damage accruing to whatever interests are covered by the policy, so far as

the assured represents those interests, whether as his own or by the precedent authority or subsequent ratification of others. On this notion rest all the cases enforcing insurance effected by consignees, factors and other bailees and agents, to the full amount of the loss. It supports, too, the judgments in most of the cases already cited. It finds a notable illustration in *Waring v. Indemnity Ins. Co.*, 45 N. Y. 606, where the plaintiffs had taken out a floating policy insuring themselves against loss by fire on goods "sold but not removed," and it was held that they could recover the full amount of the insurance, although when the fire occurred the property had been sold and completely delivered by the plaintiffs, and their responsibility terminated, but the goods had not been removed by the vendees from the place of storage. The description in the policy embraced the goods destroyed, and the plaintiffs recovered for the benefit of their vendees.¹ See also *Strong v. Manuf. Ins. Co.*, 10 Pick. 40, and *Marts v. Cumberland Ins. Co.*, 15 Vroom, 478.

In the case before us there is no doubt that the plaintiff represented his wife's interest as well as his own, and that he intended to effect this insurance on behalf of both, and that such intention was known to the underwriters. This fact of representation is not, indeed, expressly stated in the policy, but it is no part of the law either of contracts or of evidence, that the principal shall be disclosed on the face of the writing. In *Insurance Company v. Chase*, 5 Wall. 509, the assured was only one of five trustees of a Congregational church in Portland, and the policy insuring the church edifice was issued to him as if he had been personally the absolute owner in fee; the company contended that the policy could cover only his individual interest, or, at the furthest, the fractional interest which he had as trustee. But the court held that the plaintiff, having assured the building with the assent of his co-trustees and for the benefit of the *cestuis que trustent*, the company could not

¹ INSURABLE INTEREST OF BAILEES. "Agents, commission merchants or others, having the custody of, and being responsible for, property, may insure in their own names; and they may, in their own names, recover of the insurer not only a sum equal to their own interest in the property by reason of any lien for advances or charges, but the full amount named in the policy up to the value of the property. In all such cases, the right to insure and the right to recover seem to be founded upon the relation above adverted to. See *DeForrest v. Fulton Ins. Co.*, 1 Hall Sup. Ct. Rep. 84; *Stillwell v. Staples*, 19 N. Y. 401; *Siter v. Motts*, 1 Harris Penn. St. R. 218. The right is put upon the fact that having the possession of the property exclusive as to all but the owner, to whom they are responsible, they have the right to protect from loss, so that it or its value may be rendered to the owner when he calls for his own." — *Waring v. Ins. Co.*, 45 N. Y. 606, 611.

complain that the character of the interest was not incorporated in the policy and must pay the whole loss.

The policy now under consideration clearly indicates a design to have the insurance cover the entire ownership. This would be inferred, at least for the purpose of supporting the contract, from the fact that no particular interest is mentioned as the subject matter of the insurance, but it more expressly appears in the clause which provides for estimating the amount of loss or damage, according to the actual value of the insured property at the time of the fire, in that which requires the proof of loss to set forth the value of the property insured and the interest of the assured therein, and in that which gives to the company an option of replacing the property burned with other of the same kind and goodness. These expressions show that the property insured was not necessarily the interest of the assured alone. *Waters v. Assurance Co.*, 5 E. & B. 870; *Merrett v. Farmers' Ins. Co.*, 42 Iowa, 11. * * *

The judgment of the Supreme Court should be affirmed.

For affirmance—The CHANCELLOR, DIXON, KNAPP, SCUDDER, CLEMENT, COLE, KIRK, PATERSON, WHITAKER—9.

For reversal—The CHIEF JUSTICE, DEPUE, MAGIE, GREEN—4.

b. Insurable Interest in Life.

1. INSURABLE INTEREST IN ONE'S OWN LIFE.

ÆTNA LIFE INSURANCE COMPANY v. FRANCE.

94 U. S. 561. — 1876.

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This action was brought by David France and Lucetta P., his wife, to recover the amount of a policy of insurance for \$10,000, issued by the Ætna Life Insurance Company on the life of Andrew J. Chew, of Philadelphia, dated September 13, 1865, and payable to the said Lucetta, who was Chew's sister.

The proposals for the insurance, made out upon one of the printed blanks of the company, were signed by both Chew and Mrs. France. * * *

The trial resulted in a verdict and judgment for the plaintiffs. The defendant sued out this writ of error. * * *

On the question whether Lucetta P. France had an insurable interest in the life of Chew, the conceded facts are that she was his

sister, as stated in the policy; that, at the time the policy was issued, she was married to the other plaintiff, David France, and in no way dependent on her brother for her support; that the latter was earning his living as a ladies' shoemaker, and was of small means. Evidence was given tending to show that Mrs. France had, at different times, loaned money to her brother to an amount of some \$2,000, and lent him \$400 more in September, 1865; that a previous policy of like amount with the present had been obtained of the defendant company on Chew's life for his sister's benefit in June of the same year, and that at the time of issuing the policy now in suit he was unmarried, but was engaged to be married, and was in fact married the next day. The policy, as well as the several receipts for the annual premiums, signed by the secretary of the company, and countersigned by its agent in Philadelphia, all acknowledged that said premiums were received from Chew.

The construction given to the policy by the court below was, that it was a contract between the company and Chew for an assurance of his life, with a stipulation and agreement that the money should be paid to his sister; and the court held that such a policy is sustainable at law on account of the nearness of the relationship between the parties, and especially as Mrs. France, at the time the insurance was effected, was one of Chew's next of kin, prospectively interested in his estate as a distributee. We concur in the construction of the policy made by the court, and in the validity of the transaction. As held by us in the case of the *Connecticut Mutual Life Insurance Company v. Schaefer*, *supra*, p. 457, any person has a right to procure an insurance on his own life and to assign it to another, provided it be not done by way of cover for a wager policy; and where the relationship between the parties, as in this case, is such as to constitute a good and valid consideration in law for any gift or grant, the transaction is entirely free from such imputation. The direction of payment in the policy itself is equivalent to such an assignment.

The insurance company gave in evidence three promissory notes given by Lucetta P. France herself for part of the last three premiums paid on the policy, and requested the court to charge, that if the jury believed that the premiums on the policy were paid by Lucetta P. France, whether in cash or by her notes, there was evidence from which they could find that the application for insurance was made and the policy in question taken out by her for her own benefit; and, if such was the case, she must show an insurable interest in the life of her brother, beyond that of mere relationship, before she could recover. The court refused so to charge; and, we

think, rightly. Waiving the question, whether, merely as sister of Chew, Mrs. France could have effected in her own name an insurance on his life, without its being obnoxious to the charge of a wager policy, the evidence was incompetent to prove the fact sought to be proved by it. The company, when taking the notes in question, acknowledged the premiums to have been received from Chew, and was estopped from going behind its own admission, under the circumstances of the case. The contract of insurance, as correctly construed by the court, was made with Chew; and the relationship of the parties was such as to divest the assignment of the policy or the direction of its payment to his sister of all semblance of a wagering transaction. Under the circumstances, it matters not if the money or notes required for paying the premium did come from Mrs. France; at most, it was by way of advance on her brother's account, and on his contract. He had a right to take out a policy on his own life for his sister's benefit; and she had a right to advance him the necessary means to do so. As between strangers, or persons not thus nearly connected, such a transaction would be evidence to go to the jury, from which, according to the circumstances of the case, they might or might not infer that it was mere gambling. But as between brother and sister, or other near relations, desirous of thus providing for each other, and, as said by Chief Justice Shaw, presumed to be actuated by "considerations of strong morals, and the force of natural affection between near kindred operating often more efficaciously than those of positive law," (*Loomis v. Eagle Life Ins. Co.*, 6 Gray, 399), the case is divested of that gambling aspect which is presented where there is nothing but a speculative interest in the death of another, without any interest in his life to counterbalance it. On this ground we hold, that where, as in this case, a brother takes out a policy on his own life for the benefit of his sister, it is totally immaterial what arrangement they choose to make between them about the payment of the premiums. The policy is not a wager policy. It is divested of those dangerous tendencies which render such policies contrary to good morals. And as the company gets a perfect *quid pro quo* in the stipulated premiums, it cannot justly refuse to pay the insurance when incurred by the terms of the contract. * * *

Judgment affirmed.¹

¹ In *Whitmore v. Supreme Lodge*, 100 Mo. 36, the defendant issued its benefit certificate to Mary Mudd, a member of the order, payable to Marie E. Whitmore, as trustee of her daughter, Marie L. Whitmore. Marie E. and her husband Benjamin T. sued upon the certificate. Defendant claimed that Benja-

2. INSURABLE INTEREST IN THE LIFE OF ANOTHER.

*a. Relationship.*SINGLETON *v.* ST. LOUIS MUTUAL INS. CO. ET AL.

66 Mo. 63. — 1877.

HENRY, J. — Plaintiff sued defendants on a policy of insurance issued by the St. Louis Mutual Life Insurance Company, on the life of John T. Anderson, procured by plaintiff, who paid the premiums, and was to receive the amount for which said life was insured by said company, on the death of said Anderson.

Plaintiff was an uncle of John T. Anderson, but it was neither alleged nor proved by plaintiff that he had any pecuniary interest in his life and the mere relation of uncle and nephew does not constitute an insurable interest, to enable either to insure the life of the other. It is maintained with great ability by Messrs. McFarlan and Jones, attorneys for plaintiff, that a policy of insurance, effected by one on the life of another in which he has no pecuniary interest, is valid; and they rely upon *Chisholm v. Insurance Co.*, 52 Mo. 213, in which this court (Wagner, J.) said: "In this State we have no statute on the subject covering this case, and as the policy is not void by the common law, it can only be declared so on the ground that it is against public policy. There is nothing to show that the contract was a mere wagering one, or that it is in any wise against or contrary to public policy." These remarks, of course, are to be restricted to the case then under consideration. The plaintiff there had insured the life of Clark, between whom and herself there was a marriage engagement, and the court held that she had a pecuniary interest in the life of Clark, remarking that, "had he observed and kept the same (his contract of marriage), then, as his wife, she would have been entitled to support. Had he lived and violated the contract, she would have had her action for damages." There are intimations in the opinion which support the views urged by respondent's attorney, but they are *obiter dicta*. The case of *Insurance Co. v. Johnson*, 24 N. J. Law, 576, is approvingly cited by the court, but a different doctrine from that announced in that case has been held in Massachusetts, New York, Connecticut,

min T. procured Mary Mudd to thus insure her life, and that he paid the premiums, and that he had no insurable interest in Mary Mudd's life. It was held that an instruction that what Benjamin T. Whitmore could not do directly, in the way of effecting an assurance on a life in which he had no insurable interest, he could not do indirectly, was correct. See also, upon this point, *Brockway v. Co.*, 9 Fed. 249.

Maine, Rhode Island, Indiana, by the Circuit Court of the United States, by Dillon, J., in *Swick v. Insurance Co.*, 2 Dill. 161, Fed. Cas. No. 13,692, and in this State in *McKee v. Insurance Co.*, 28 Mo. 383. And in *Gambs v. Insurance Co.*, 50 Mo. 44, it was held indirectly that a person procuring an insurance on the life of another must, to make it valid, have a pecuniary interest in the life insured. In the latter case, Bliss, J., said: "Gambling, or wager policies, are those where the persons for whose use they issue have no pecuniary interest in the life insured. But the wife has a direct interest in the life of her husband." In the former case, Scott, J., said: "There is nothing in the contract as stated in the petition, which shows it to be a wagering one, or in any wise contrary to public policy."

He then proceeds to show that the plaintiff had a pecuniary interest in the life of the husband, which she insured for her benefit. In *Evers v. Association*, 59 Mo. 430, Wagner, J., who delivered the opinion of the court, did not seem entirely satisfied with *Chisholm v. Insurance Co.* He said: "Our opinion on this subject was expressed in *Chisholm v. Insurance Co.*, 52 Mo. 213, to some extent, but it is not necessary to examine the question further in this case, as the plaintiff's own instructions assume that such an interest is necessary." As the observations of our court on this subject, in the case referred to, are *obiter dicta*, the question may be considered an open one in this State. In his Commentaries (volume 3, p. 462) Chancellor Kent said: "But policies, without interest upon lives are more pernicious and dangerous than any other class of wager policies, because temptation to tamper with life is more mischievous than incitement to mere pecuniary fraud." In *Lord v. Dall*, 12 Mass. 115, it was held "that, unless the assured had an interest in the life insured, it would be a mere wager policy, which we think would be contrary to our laws, and therefore void." In *Stevens v. Warren*, 101 Mass. 564, *Lord v. Dall* was cited and approved, and Willis, J., speaking for the court, said: "The general rule recognized by the courts has been that no one can have an insurance upon the life of another, unless he has an interest in the continuance of that life." To the same effect are the cases of *Mitchell v. Insurance Co.*, 45 Me. 104; *Lewis v. Insurance Co.*, 39 Conn. 101; *Bevin v. Insurance Co.*, 23 Conn. 244; *Mowry v. Insurance Co.*, 9 R. I. 346; *Insurance Co. v. Hays*, 41 Ind. 117; *Ruse v. Insurance Co.*, 23 N. Y. 516; *Freeman v. Insurance Co.*, 38 Barb. 247; *Cammack v. Lewis*, 15 Wall. 643; *Swick v. Insurance Co.*, 2 Dill. 161, Fed. Cas. No. 13,692; May, Ins. § 587, p. 724.

Neither the case of *Shannon v. Nugent*, Hayes, Exch. 539, nor

Ferguson v. Lomax, 2 Dru. & War. 120, cited in *Chisholm v. Insurance Co.*, *supra*, sustains the doctrine contended for by respondent. In the latter case the question was neither considered by the court nor presented in the brief of counsel, and in the former, Joy, C. B., speaking for the court, said: "It is not now necessary for us to decide whether a life insurance, made in Ireland, must be on interest." He stated, however, that the leaning of the court was, that interest was not necessary to give it validity. We feel constrained, therefore, by the weight of authority to hold that the policy of insurance procured by one upon the life of another, for the benefit of the former, who has no pecuniary interest in the continuance of the life insured, is against public policy, and therefore void. This policy, upon its face, does not state an interest, nor in the application is it stated that Singleton had a pecuniary interest in the life of Anderson. The following question was propounded to the applicant: "Has the beneficiary (if a creditor) an interest in the life to be assured to the full amount of this application?" To which he answered "No." He does not state that he is a creditor. It was neither averred, in the plaintiff's petition, nor proved, that plaintiff had any pecuniary interest in the continuance of the life of John T. Anderson. The following instruction, asked by defendant, the court refused: "That to entitle plaintiff to recover in this action, he must show some insurable interest in the life of John T. Anderson, the insured, and that in the absence of any evidence, showing or tending to show such insurable interest, the jury must find for defendant."

Plaintiff's counsel contend that it devolved upon defendant to show that plaintiff had no such interest, and several cases from our own Reports are relied upon as authority for this position. In the earlier of these cases all that was determined was that when a contract was good at common law, without being reduced to writing, after the passage of the statute of frauds it was matter of defense to be pleaded that the contract was not in writing. The case here is of a contract void at common law, upon its face, and of course it devolves upon plaintiff to show such facts as render it valid and binding. In *Freeman v. Insurance Co.*, *supra*, the court said: "It must be considered as well settled at present that at common law, as well as under the statute of betting and gaming, a policy of fire insurance is void, unless the party has at the time an insurable interest. It follows that a complaint in an action on the policy must contain an averment of such an interest, in order to state a cause of action." "The plaintiff must aver an insurable interest, or if he has not that, the grounds upon which he rests his right to

sue." May, Ins. § 587. In *Ruse v. Insurance Co.*, *supra*, in which the opinion was delivered by that able jurist, Judge Selden, the court said: "And it is apparent from the authorities, that it had always been previously held in suits upon policies, not containing the words, 'interest or no interest,' or other equivalent words, that the plaintiff must aver and prove that he had an interest." This was said in reference to *Depaba v. Ludlow*, Comyn, 361, which shows how the doctrine that wagering policies upon ships are valid, originated. The defendant there had insured the plaintiff, "interest or no interest," and it was held that the import of that clause relieved plaintiff from proving his interest. That the plaintiff must, in these cases, aver and prove an interest, was held in the Supreme Court of Illinois, in *Insurance Co. v. Hogan*, 80 Ill. 35, and that he must prove the same affirmatively as a part of the case.

The court below erred in refusing to give defendant's tenth instruction, and for that error the judgment must be reversed. * * *

CRONIN v. VERMONT LIFE INS. CO.

20 R. I. 570. — 1898.

STINESS, J. — This action is brought to recover insurance on the life of the plaintiff's niece, and the main question raised by the defendant to the declaration is whether the plaintiff had an insurable interest in the life of her niece. The English act of 1774 (14 Geo. III. c. 48, § 1) prohibited insurance on the life of a person in which the beneficiary *shall have no interest, or by way of gaming or wagering*. Although the statute has never been taken as a part of our law, its rule was generally followed in this country, as declaratory of the common law. But, in defining the term "*interest*," the tendency of the decisions both in England and in this country has been inclusive, rather than exclusive. There has even been some question whether insurance without interest should be held to be void on the ground of public policy; but, in this State, we think it has been understood to be settled, since *Mowry v. Insurance Co.*, 9 R. I. 346, that some insurable interest must exist. This, too, is the generally accepted rule. In *Clark v. Allen*, 11 R. I. 439, it was held that a policy valid in its inception could be transferred to a *bona fide* purchaser even though he had no interest in the life, and some of the objections to such insurance, on the ground of public policy, were considered, and shown to be fanciful, and not applied to other branches of law. For example, the element of chance enters into annuities; and the temptation to shorten life, in order

to hasten the possession of a remainderman after a life estate in real property, is as strong as in the case of a beneficiary under a life policy.

But these things have never been considered to be contrary to public policy. Still, upon principle, a purely speculative contract on the life of another is as objectionable on the grounds of public policy as a like contract in regard to grain or stocks. In fact, it is more so, and such a contract may properly be held to be void. But the case is quite different when one, by his own contract, or even in the name of another, or upon the ground of debt, affection, or mutual interest, procures insurance for the benefit of another, which is really to stand in the place of a testamentary gift. And so kinship and debt have come to be recognized as sufficient grounds of interest. Bliss, Ins. (2d Ed.) §§ 12, 13; 1 May, Ins. (3d Ed.) § 102a. Recent decisions have gone further, looking more to the situation of the parties than to these relations alone. In *Warnock v. Davis*, 104 U. S. 775, Field, J., said: "It is not easy to define with precision what will constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life." We think that this states a reasonable rule, and that it is now substantially the accepted rule. The demurrer in this case being to the whole declaration, we need not examine the counts in detail. The important facts are that the niece lived with the aunt from early childhood at different times, amounting to years; that their relations were as those of mother and daughter; that the plaintiff supported her niece, the insured, and that a debt, both of affection and of money, was due to the plaintiff, for which she expected, and had a right to expect, return from the insured. Does this not set out an insurable interest? We do not understand the word "debt," as here used, to mean a debt recoverable at law, but a moral obligation, from which the plaintiff had the right to expect care and kindness from the niece in case of need. Taken in this view, we think it shows an insurable interest, under the principles above laid down.

In *Lord v. Dall*, 12 Mass. 115, it was held that a sister had an insurable interest in the life of a brother, who stood to her in *loco parentis*. The court said: "In common understanding, no one would hesitate to say that in the life of such a brother the sister had an interest." The later case of *Loomis v. Insurance Co.*, 6 Gray,

396, involved the question of the interest of a father in the life of a minor son; but Shaw, C. J., said that, upon broader and larger grounds, independently of the fact that the son was a minor, and that the assured had a pecuniary interest in his earnings, the court was of opinion that the father had an insurable interest. These broader grounds appeared further on to be "consideration of strong morals, and the force of natural affection between near kindred, operating often more efficaciously than those of positive law." In *Insurance Co. v. France*, 94 U. S. 561, — a case between brother and a married sister, not dependent, — Bradley, J., goes so far as to say: "Any person has a right to procure insurance on his own life, and to assign it to another, provided it be not done by way of cover for a wager policy; and where the relationship between the parties, as in this case, is such as to constitute a good and valid consideration in law for any gift or grant, the transaction is entirely free from such imputation. The direction of payment in the policy itself is equivalent to such an assignment." In *Elkhart v. Houghton*, 103 Ind. 286, 2 N. E. 763, the insurable interest of a grandson in the life of a grandfather, with whom he lived, was upheld. It has also been sustained where there was no kinship, as in the case of a woman who was engaged to be married to a man (*Chisholm v. Insurance Co.*, 52 Mo. 213), and in the case of a widow and her son-in-law, who lived together (*Adams v. Reed* [Ky.] 38 S. W. 420).

The principle of these and other like cases is that the interest does not depend upon any liability for support, nor upon any pecuniary consideration, nor even upon kinship. It may be for the benefit of the old or the young, where the relation between the parties is such as to show a mutual interest, and to rebut the presumption of a mere wager. The contract is complete and legal in itself, and, when considerations of public policy do not prohibit its enforcement, there is no reason why it should not be carried out.

The declaration in this case shows that the plaintiff's claim is not objectionable on the grounds of public policy. It shows that the relation of the plaintiff and her niece had been of such a character that each had reason to rely upon the other in case of need. Should the younger die first, the help and care which might have been expected from her in the declining years of the aunt could only be supplied by insurance on her life. This is no more speculation than a husband's provision for his wife in the same way. It is natural and reasonable, and in accordance with modern business methods. In short, it is security for an insurable interest. We therefore think that the contract set out in the declaration is valid, since it

falls within the proper line of distinction between valid contracts, where there is mutual interest, and invalid contracts, which are evidently mere speculation.

The demurrer to the declaration is overruled.¹

BRADLEY, J., IN CONNECTICUT MUTUAL LIFE INS. CO. v. SCHAEFER.

94 U.S. 457. — 1876.

IT WILL be proper, in the first place, to ascertain what is an insurable interest. It is generally agreed that mere wager policies — that is, policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction — are void, as against public policy. This was the law of England prior to the Revolution of 1688.² But after that period a course of decisions grew up sustaining wager policies. The Legislature finally interposed, and prohibited such insurance: first, with regard to marine risks, by statute of 19 Geo. II, c. 37; and next, with regard to lives, by the statute of 14 Geo. III., c. 48. In this country statutes to the same effect have been passed in some of the States; but where they have not been, in most cases either the English statutes have been considered as operative, or the older common law has been followed. But precisely what interest is

¹ "The liability of a child under the poor laws for the support of a parent, with the natural feelings of affection producing a desire to provide for the comfort of the parent, gives a right to the child to effect an insurance on the life of the parent." Syllabus in *Mut. Reserve Ins. Co. v. Kane*, 81 Pa. 154. "It is the well founded expectation of advantage to be derived from the continuance of the life insured which makes the insurable interest in it, and not the mere relationship as between father and son, under any and all circumstances." — *Guardian Ins. Co. v. Hogan*, 80 Ill. 35, 46.

LACK OF INSURABLE INTEREST IN INCONTESTABLE POLICIES. "The question remains, whether that clause of the policy which provides that the instrument shall become 'incontestable' on the lapse of a period of a year or upwards, during which premiums are regularly paid, furnishes a good answer to the objection founded on the terms of the Code [art. 2590 of the Civ. Code of Lower Canada: 'The insured must have an insurable interest,' etc.]. The rule of the Code appears * * * to be one which rests upon general principles of public policy and expediency and which cannot be defeated by the private convention of the parties. Any other view would lead to the sanction of wager policies." — *Anctil v. Ins. Co.*, [1899] A. C., p. 609. *Contra*, *Wright v. Mut. Benefit Life Assoc.*, 118 N. Y. 237, 241, reported herein at p. 264.

² But see the statement as to the validity of wagers, in England, at common law, in *Dalby v. Co.*, reported herein *ante*, p. 8.

necessary in order to take a policy out of the category of mere wager, has been the subject of much discussion. In marine and fire insurance the difficulty is not so great, because there insurance is considered as strictly an indemnity. But in life insurance the loss can seldom be measured by pecuniary values. Still an interest of some sort in the insured life must exist. A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him.

It is well settled that a man has an insurable interest in his own life, and in that of his wife and children; a woman in the life of her husband; and the creditor in the life of his debtor. Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. And there is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend; or two or more persons, on their joint lives, for the benefit of the survivor or survivors. The old tontines were based substantially on this principle, and their validity has never been called in question. The essential thing is, that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest.

b. Debtor and Creditor.

FIELD, J., IN CONNECTICUT MUTUAL LIFE INS. CO. *v.*
LUCHS.

108 U. S. 498, 505. — 1883.

THE second question presented for our determination is whether Luchs had an insurable interest in the life of Dillenberg. Upon this we have no doubt. Dillenberg was his partner and had not paid his promised proportion of the capital of the concern. At the time the policy was applied for he was still in default, and although it might have turned out that the actual amount due upon a settlement of accounts was less than the promised proportion, it was not a matter definitely ascertained at the time. Besides what was thus due to him, Luchs was interested in having Dillenberg continue in the partnership. He had such an interest, therefore, as took from the policy anything of a wagering character. * * * Certainly Luchs had a pecuniary interest in the life of Dillenberg on two grounds: Because he was his creditor and because he was his partner. The

continuance of the partnership, and, of course, a continuance of Dillenberg's life, furnished a reasonable expectation of advantage to himself. It was in the expectation of such advantage that the partnership was formed, and, of course, for the like expectation, was continued.

In *Morrell v. Trenton Mutual Life and Fire Insurance Company*, 10 Cushing, 282, a policy was taken out by the plaintiff upon the life of his brother, who was about going to California, on an agreement that the latter should pay to him one-fourth of his earnings for the following year. In an action on the policy it was contended that the plaintiff had no insurable interest upon the life of the insured, but the court, after deciding that he had such an interest from the fact that he held a promissory note signed by the firm of which the insured was a partner, also said that it was strongly inclined to the opinion that the plaintiff had another interest in the life of the person insured. "He had," said the court, "a subsisting contract with that person, made on a valuable consideration, by which he was to receive one-quarter part of his earnings in the mines of California for one year. Such an interest cannot, from its nature, be valued or apportioned. It was an interest upon which the policy attached. By the loss of his life within the year, the person whose life was insured lost the means of earning anything more, and the plaintiff was deprived of receiving his share of such earnings to an uncertain and indefinite amount."

In *Trenton Mutual Life and Fire Insurance Company v. Johnson*, 4 Zabriskie's Reports, 576, a policy was taken out by the plaintiff on the life of one Van Middlesworth for \$1,000, one-half payable to the plaintiff and the other half to Van Middlesworth. They belonged to an association called the New Brunswick and California Mining and Trading Company, the capital stock of which consisted of forty-five shares of \$600 each. The company consisted partly of shareholding members and partly of active members, the shareholders being each required to furnish a substitute to proceed to the mines of the company. The plaintiff owned one share, advanced \$600 of capital and procured Van Middlesworth to go out as his substitute, which he did, and acted as his agent and substitute; and the assets of the company having been divided in California, he received the plaintiff's share, and afterwards died, not having paid it over. By one of the articles of the association all treasures and all the proceeds of the labor of each member, and all profits, were to go into a general fund for the benefit of the association. To the action brought on the policy it was objected that the plaintiff had no insurable interest in the life of the deceased. On this question the

court said: "In the present case Johnson had a direct interest in the life of his substitute, whose earnings were to constitute a part of the joint funds, of which he was entitled to his share, an interest fully equivalent to the interest of a wife in the life of her husband, of a child in that of a parent, or a sister in that of a brother. And at Van Middlesworth's death, although prior to that time the company had been virtually dissolved, he had an interest in him as his creditor to the extent of his share of the assets in his hands."

In *Bevin v. The Connecticut Mutual Life Insurance Company*, 23 Conn. 244, the plaintiff had obtained a policy of insurance for \$1,000 on the life of one Barstow, to whom he had advanced \$350, besides articles of personal property, to enable him to go to California and there labor for one year, on an agreement that he would account to the plaintiff for one-half of his gains. The court said that Barstow was the plaintiff's debtor and partner, giving to the plaintiff an interest in the continuance of his life, as by that means, through his skill and efforts, the plaintiff might expect not only to get back what he had advanced, but to acquire great gains and profits in the enterprise. "All the books," the court added, "hold this to be a sufficient interest to sustain a policy of insurance. As to the value of this interest, we think it must be held to be what the parties agreed to consider it in the policy. This was the sum asked for by the plaintiff, and which the defendants agreed to pay in case of death, and for which they were paid in the premiums given by the insured. The policy must, we think, be held to be a valued policy." And after referring to a policy of insurance obtained by a sister on her brother's life, where no question seemed to have been made as to the amount, but only whether it was an interest which the law would recognize, the court said: "So, in every case, where a person on his own account insures the life of a relative, if the sum named in the policy is not to be the rule of damages, we inquire what is? The impossibility of satisfactorily going into the question in most cases, and especially where there is nothing to guide the inquiry, and everything is uncertain, would lead us to hold that a policy like this is a valued policy as most consistent with the understanding of the parties and the principles of law."¹

¹ "In the case of *Trinity College v. Ins. Co.*, 113 N. C. 244, this court said that 'under certain conditions a partner has an insurable interest in the life of his co-partner,' and cites *Ins. Co. v. Luchs*, 108 U. S. 198. There, the fact was that Luchs had furnished to the co-partnership fund for his co-partner Dillenberg, \$5,000, which was unpaid. We suppose that was the condition referred to in the opinion in the *Trinity College* case, under which a partner might have an insurable interest in the life of his co-partner. It is true that in *Ins. Co. v.*

APPEAL OF CORSON.

113 PA. ST. 438. — 1886.

BILL in equity wherein Corson, executor, etc., is plaintiff, and the Provident Savings Life Assurance Society, and James Garnier are defendants. The plaintiff claimed as executor of Ellen McLean's estate, the avails of an insurance policy for \$2,000 issued upon her life in favor of James Garnier. The insurance company did not defend, but paid the \$2,000 into court. The other facts appear in the opinion.

CLARK, J. * * * It cannot be pretended that Garnier had an insurable interest in the life of his aunt, by force of the mere relationship existing between them. No case has been brought to our notice which carries the rule to this extent. Between husband and wife, and parent and child, the relationship is so close and intimate, and the mutual dependence and legal liability for support so manifest, that nothing more is wanting to establish the insurable interest. Garnier, however, did not hold any such relation to Ellen McLean, either natural or assumed. He was simply her "friend and adviser." He was doubtless a valuable friend. He had advanced money to bring her to Philadelphia. He fitted up, stocked, and from time to time replenished, the store at Tenth and Manilla. Having disposed of this for her benefit, he purchased the establishment on Fitzwater, and, selling this, he bought for her a third, on Fifth below Christian. She repaid Garnier, however, for his outlays in her behalf, from time to time, from the ordinary receipts of the several stores, and from the proceeds of the sales.

The only relation existing between James Garnier and Ellen McLean which could give Garnier an insurable interest in her life was that of debtor and creditor, and upon this ground alone the case must be considered. It is not denied that at the date of the policy Mrs. McLean was indebted to Garnier, for money advanced and expended in her behalf, in some amount between \$500 and \$750. It is said, however, in his answer that Garnier disclaims as a creditor; that he places his right to the proceeds of the policy on other grounds, and makes no claim whatever by reason of any indebtedness. We do not so understand either the answer or the evidence given by the defendant in the case. The bill charges, in the first paragraph, in substance, that the policy was taken out and applied

Luchs, supra, the court said that the continuance of the partnership was also a reasonable expectation of advantage to Luchs and gave him an insurable interest in the life of his co-partner. But we are of the opinion that that position is against the weight of authority." — *Powell v. Dewey*, 123 N. C. 103, 105.

as a collateral security to the debt which Mrs. McLean then owed Garnier; and, in the subsequent paragraphs, that the debt having been fully paid in the lifetime of the assured, the proceeds of the policy should pass into her estate. This fact is specifically denied, the defendant in his answer says it is "not true that the policy of insurance, referred to in paragraph one of the complainant's bill, was applied for and issued upon the life of Ellen McLean for any such reason or purpose as therein stated."

It is undisputed, however, that at the issuing of the policy the relation of debtor and creditor did exist, and to the extent stated. The defendant having denied that the policy was taken as collateral security for that debt, a question of fact is thus raised to be determined by the evidence. Upon examination of the proofs we find no evidence from which the fact might be fairly inferred. The insurance was not effected at the instance of Mrs. McLean, but at the suggestion of her son, Samuel McClatchy, in whose name a second policy in \$1,000 was at the same time issued. The premiums were paid and the policy maintained by Garnier. Indeed, there is not the slightest proof in support of the plaintiff's hypothesis, that the policy was held in trust for the debtor, and, in the absence of such proof, the presumption is that the rights of the parties appear upon the face of the policy. *Cunningham v. Smith*, 70 Pa. St. 450.

It has been said, however, on the authority of *Godsall v. Boldero*, 9 East, 72, that an insurance upon the life of a debtor, in behalf of a creditor, is in legal effect but a guaranty of the debt, and, if the debt is paid, the insurance is at an end. But it is now settled that this case is not the law. It was directly drawn in question, and was expressly overruled, in *Dalby v. Assurance Co.* (decided in the Exchequer Chamber), 15 C. B. 365. The law seems to be well settled that it is wholly unnecessary to prove an insurable interest in the life of the assured at the maturity of the policy if it was valid at its inception, and, in the absence of express stipulation to the contrary, the sum expressed on the face of the policy is the measure of recovery. *Rawls v. Insurance Co.*, 27 N. Y. 282; *Mowry v. Insurance Co.*, 9 R. I. 346; *Hoyt v. Insurance Co.*, 3 Bosw. 440; *Insurance Co. v. Bailey*, 13 Wall. 616.

The doctrine of all the cases to which our attention has been called, is that, if the policy was originally valid, it does not cease to be so by cessation of interest in the subject of insurance unless such be the necessary effect of the provisions of the instrument itself. Therefore, where a husband insured his life for the benefit of his wife, and was subsequently divorced, it was held that notwithstanding the relation of husband and wife no longer existed,

and her insurable interest had thus ceased, yet she could recover the full amount of the policy. *Insurance Co. v. Schaefer*, 94 U. S. 457. "Supposing a fair and proper insurable interest of whatever kind," says the court in the case last cited, "to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained and there is then no good reason why the contract should not be carried out according to its terms." To the same effect is *McKee v. Insurance Co.*, 28 Mo. 383. All the cases to which we have referred, it is true, arose from suits brought upon the policies of insurance; but the same principles apply where the company, admitting its liability, has paid the money into court to abide the result, and the controversy is between the remaining parties.

In our own case of *Scott v. Dickson*, 16 Wkly. Notes Cas. 181, [108 Pa. 6] our Brother Paxson, upon a review of the cases, concludes that, where one has an insurable interest at the time an insurance is effected upon the life of another for his benefit, the fact that his interest ceases to exist at or prior to the death of the insured will not, as against the personal representatives of the insured, deprive him of the right to receive the insurance money. Therefore it was held that a surety on an official bond had an insurable interest in the life of the obligor, and that his right to recover upon the policy was not affected by the fact that no breach of the condition of the bond had ever occurred. But a merely colorable, temporary, or disproportionate interest may present circumstances from which want of good faith, and an intent to evade the rule, may be inferred. Therefore, although the relation of debtor and creditor may in general be said to establish an insurable interest, the amount of the insurance placed upon the life of the debtor cannot be grossly disproportionate to the benefit which might be reasonably supposed to accrue from the continuance of the debtor's life, without leaving the transaction open to the imputation of being a speculation or wager upon the hazard of a life. *Wainwright v. Bland*, 1 Moody & R. 481; *Miller v. Insurance Co.*, 2 E. D. Smith, (N. Y.) 268.

The case of *Cammack v. Lewis*, 15 Wall. 643, is exactly in point. The policy was taken out by Cammack, the creditor, upon the life of Lewis, his debtor, in the sum of \$3,000, — \$2,000 for his own benefit, and \$1,000 for the benefit of Lewis. Lewis, in fact, only owed Cammack \$70, although he voluntarily and without consideration gave his obligation at the time for \$3,000. "If the transaction," says Mr. Justice Miller, "as set up by Cammack be true, then, so far as he was concerned, it was a sheer wagering policy,

and probably a fraud on the insurance company. To procure a policy for \$3,000 to cover a debt of \$70 is of itself a mere wager. The disproportion between the real interest of the creditor and the amount to be received by him deprives it of all pretense to be a *bona fide* effort to secure the debt, and the strength of this proposition is not diminished by the fact that Cammack was only to get \$2,000 out of the \$3,000; nor is it weakened by the fact that the policy was taken out in the name of Lewis, and assigned by him to Cammack. This view of the subject receives confirmation from the note executed by Lewis to Cammack for the precise amount of the risk in the policy, which, if Cammack's account be true, was without consideration, and could only have been intended for some purpose of deception, — probably to impose on the insurance company." ¹ See also *Insurance Co. v. Luchs*, 108 U. S. 498, 2 Sup. Ct. 949.

In the case at bar the policy was \$2,000. The amount of the indebtedness was, at the time, undetermined, and therefore uncertain. It is since ascertained to have been between \$500 and \$750. Considering the character of their business relations, the unsettled condition of their affairs, the age of the subject of insurance, the probable amount of premiums which might accrue, the accumulation from interest, we could not say the transaction carries with it any inherent evidence of bad faith. The essential thing is,

¹ "We think that Cammack could in equity and good conscience only hold the policy as security for what Lewis owed him when it was assigned, and such advances as he might afterwards make on account of it." — *Cammack v. Lewis*, 15 Wall. 643, 648.

"A distinction must be drawn between a contract of insurance on his own life, made by one who is indebted to another, and who transfers the policy to his creditor for the security of his debt, and a contract which is made directly by the creditor with the insurer to insure the life of his debtor. In the first instance the contracting parties are the person whose life is insured and the insurer. In that case the creditor has no rights except such as may be given to him by the assignment of the policy. The object of the transfer is to secure the payment of the debt due the creditor. The assignment accomplishes nothing else; and if, by any means, the debt be paid prior to the decease of the debtor, the assignment has no force or effect, and the original contract is in force, and the beneficiaries named in the contract will take the proceeds of the policy. But where a creditor contracts directly with the insurance company for a policy on the life of his debtor, neither the debtor nor his representatives will at any time thereafter have any interest in that contract, nor, under any circumstances, would either of them be entitled to the proceeds of such contract, because the contractual relations exist between the creditor and the insurer independent of the debtor." — Little, J., in *Exchange Bank v. Loh*, 31 S. E. 459, 469 (Ga.).

as stated by the learned judge of the court below, that the policy should be obtained in good faith, and not for the purposes of speculation upon the hazard of a life in which the insured has no interest.

The case is materially different from *Gilbert v. Moose*, 13 Wkly. Notes Cas. 489. The principles involved in that case are not drawn in question here.

We find no error in the decree of the court below, and it is therefore affirmed. The decree is affirmed, and the appeal dismissed, at the costs of the appellant.

RITTLER *v.* SMITH.

70 MD. 261. — 1889.

MILLER, J. — In June, 1886, Victor Smith was indebted to William H. Rittler in the sum of about \$1,000, and Smith being insolvent, Rittler took out certificates of insurance on Smith's life, in four several mutual aid associations, aggregating on their face the sum of \$6,500. These certificates were all in favor of Rittler and he paid all the premiums or assessments thereunder. Smith died in March, 1887, and Rittler collected from these insurances the sum of \$2,124.82, which appears to have been all that could have been collected according to the terms of the certificates, and the financial condition of the associations. Deducting from this sum the debt and interest due Rittler, the premiums he had paid, and the costs and expenses of effecting the insurances, there remained a balance of \$474.53, as of the 1st of June, 1887. On the 3d of October following, letters of administration on Smith's estate were granted to an administratrix, who thereupon filed her bill claiming this balance as belonging to the estate of the decedent. In his answer Rittler denied this claim, and insisted that the money belonged to him. The case was heard on bill and answer, and the court below decreed in favor of the complainant. From this decree Rittler has appealed.

The question as thus presented is an interesting one, is of first impression in this State, and has been very ably argued. On the part of the appellant it is contended that where a creditor with his own money and for his own account, effects and keeps up an insurance on the life of his debtor, the whole of the proceeds belong to him unless it appears that he has gone into it for the mere purpose of speculation, which in this case is expressly negated by the answer, the averments of which must be taken as true, the case having been heard on bill and answer. On the other hand, counsel for the appellee contend that where the creditor receives more than

enough to reimburse him for his debt and outlay, with interest, he will, as to the balance, be regarded as a trustee for the personal representative of the debtor; that the law says to the creditor in such a case, "you may protect yourself; you may by insuring your debtor's life secure your debt with all outlay and expenses; you may make yourself whole, but you shall not speculate on his death; you shall not have a greater direct pecuniary interest in his death than you may have in his life." * * *

If such then be the nature of a life insurance contract, and if a *bona fide* assignee for value, though a stranger, may recover and hold the whole amount for his own use, why may not a creditor who in pursuance of a *bona fide* effort to secure payment of his debt, insures the life of his debtor and takes the policy in his own name or for his own benefit, be entitled to hold all he can recover? He is in fact the owner of the policy, takes the risk of the continued solvency of the insurance company, and is obliged to keep the policy alive by paying the annual premiums during the life of the debtor, and the latter is under no obligation to do anything, and in fact does nothing in this respect. If he pays the debt to his creditor, he has only discharged his duty, and what interest has he in the policy or in what his creditor may recover upon it? In a recent English case it was held that a creditor who had insured the life of his debtor could retain all the sums he had received from the policies, without accounting for them to the representatives of the debtor, unless there was distinct evidence of a contract to the effect that the creditor had agreed to effect the policy, and that the debtor had agreed to pay the premiums, in which case only will the policy be held in trust for the debtor. *Bruce v. Garden*, Law Rep., 5 Chancery Appeals, 32. This is the latest English authority to which we have been referred, and was decided by Lord Chancellor Hatherley on appeal. In that case the amount received from the policies by the creditor was nearly twice as much as the debt due him by his debtor.

We agree that there may be such a gross disproportion between the debt and the amount of the policy, as to stamp the transaction as indicating upon its face want of good faith, and as a mere speculation or wager. The case of *Cammack v. Lewis* [15 Wall. 643] affords an instance of such gross disparity, but no general rule on this subject has as yet been laid down by the courts, and it is probably better to leave each case to depend on its own circumstances. The disparity between the debt of \$1,000 and \$6,500, the aggregate of the sums named in the certificates, is certainly great, but upon examination it is more apparent than real. The answer, which we must take as

true, shows *bona fides* on the part of the creditor. The policies were all in mutual aid associations, where mortuary dues are paid by assessments, and where, of course, the sum to be realized depends upon the number and solvency of the members. One of the certificates for \$2,000 contained a condition that only one-half should be paid if the assured should die within one year from its date, an event which actually occurred. Another expressly provided that he should receive an amount *not exceeding* \$2,000, *but according to the members liable to assessment on this certificate*, and from that he received according to its terms only \$250. Another of the associations was in financial difficulties and he compromised his claim on a certificate for \$1,000, and received only \$132.82. By taking out these certificates he became liable to be assessed as a member, and during the short time they were running (from June to the following March) he paid in this shape and in premiums the sum of \$351.75. In view of the character of these certificates and of the associations by which they were issued, we cannot say the disproportion between the debt and the real amount and value of the insurances is so great in this case as to warrant a sentence of condemnation against the transaction as being a mere speculation or wager on the life of the debtor.

Without attempting a review of all the numerous decisions on this subject we simply refer in support of our views to the following cases, in addition to those already cited: *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24; *Clark v. Allen*, 11 R. I. 439; *Olmstead v. Keyes et al.*, 85 N. Y. 593; *Amick v. Butler*, 111 Ind. 578; *Johnson et al. v. Van Epps*, 110 Ill. 562; *Appeal of Corson*, 113 Pa. St. 438. And among the text-writers to Bliss on Life Ins., § 30, and Life Insurance, Law of Assignments (Hine & Nichols), 81, 82. On the whole we are of opinion the weight of reason as well as of authority sustains the appellant's claim. We shall therefore reverse the decree appealed from and dismiss the appellee's bill.

Decree reversed, and bill dismissed.

COOPER v. SHAEFFER.

11 ATL. REP. (PA.) 548. — 1887.

ERROR to Court of Common Pleas, Lebanon County; McPherson, Judge.

Case by Allen Shaeffer, administrator of Daniel Weaver, deceased, against Jacob C. Cooper, to recover the excess of a policy of insurance on the life of said Daniel Weaver, assigned to defendant's

assignor as security for a debt, on the ground that the transaction was a wager. The facts as they appeared on the trial are sufficiently stated in the opinion. Verdict for plaintiff, \$1,100.04, and judgment thereon; whereupon defendant took this writ.

STERRETT, J. — It is conceded that the policy of \$3,000 on the life of Weaver was taken out and immediately assigned to Blouch for the purpose of securing a debt of \$100, due by the former to the latter. Subsequently one-half interest in the policy was assigned by Blouch to plaintiff in error, but Weaver was not in any manner a party to that transaction. On the death of Weaver the insurance company, recognizing its liability for the amount insured, paid \$1,800 thereof to Cooper, and the residue to Blouch. In view of the undisputed facts, the learned judge of the Common Pleas held that the disproportion between the insurance, \$3,000, and the debt, \$100, was so great as to require him to say, as matter of law, that the transaction was a wager, and that the assignees of the policy had no right to retain more of the insurance money received by them than the amount of the debt, plus the premiums paid and interest thereon. In this he was clearly right. The disproportion is so great as to make the insurance a palpable wager, and no court should hesitate to declare it so as matter of law. It has heretofore been correctly said that the sum insured must not be disproportionate to the interest the holder of the policy has in the life of the insured, but we have never found it necessary to adopt any rule by which such disproportionate interest may be determined. Speaking for himself, our Brother Paxson, in *Grant v. Kline* 19 Wkly. Notes Cas. 260, 9 Atl. 150, suggests that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt with interest, and the amount of premiums with interest thereon, during the expectancy of the life insured, according to the Carlisle tables. This appears to be a just and practicable rule.¹ * * *

Judgment affirmed.

¹ "The test that the amount of a policy taken out to secure a debt must not be out of proportion to the amount of the debt with added premiums and interest thereon will not stand scrutiny, for every one carrying the burden of keeping up a life policy may, whether a debt be thereby secured or not, suffer loss by paying out more than is finally received on the policy. In the case of a man who insured his life for the benefit of his wife, and paid out in premiums more than the insurance company paid to her after his death, the loss would be the difference between the sum of the premiums, with interest, and the proceeds of the policy. If a creditor who held as collateral security a policy of life insurance, and paid the premiums under a contract with the debtor to be reimbursed therefor out of the fund to be realized by the payment of the policy, paid to the

c. Reinsurance.

GOODRICH AND HICK'S APPEAL.

109 PA. ST. 523. — 1885.

APPEAL from the Court of Common Pleas No. 1, of Philadelphia County: of July Term, 1884, No. 128.

This was an appeal by Henry C. Goodrich and William B. Nevins, trading as Goodrich & Nevins, and Ralph Hicks, Richard Sinnott and Alfred Grissom, Jr., owners of the steamer "Mary Bell," from a decree of said court, confirming the report of an auditor appointed to report distribution of a fund constituting assets of the Penn Fire Insurance Company, an insolvent corporation.

The appellants had suffered loss under policies of fire insurance held by them in said company, and, for the reasons hereinafter mentioned, claimed a preference over general creditors of the company in the distribution of this fund; but the court below decided that their right to participate was only pro rata, with general creditors.

MR. JUSTICE CLARK. — The only question raised by the several assignments of error, in this case, is whether or not, in the distribution of the assets of the Penn Fire Insurance Company of Philadel-

company more than it returned when the debtor died (which would inevitably be the case in the event that the latter lived out his expectancy, and all premiums up to that time were duly met), this creditor, if the collateral was the only source to which he could look for satisfaction, would lose the difference between the amount received on the policy and the amount resulting from adding the sums representing the premiums, the interest thereon, *and the debt*; and this would be true whether the debt was great or small. If, for instance, one man loaned to another \$10, and insured the latter's life in the sum of \$50,000 to secure the debt, the creditor undertaking to pay the premiums, and the debtor (whether young or old) lived out his expectancy, and died, leaving no assets but the insurance money, the creditor would certainly lose the difference between the face of the policy and the sum of the premiums and the interest thereon, and would lose also the \$10 and the interest on that sum. If the debt thus created was \$25,000, the creditor's loss would, in that case, be greater by \$24,990 and interest than in the other. There would be no difference in principle between the two cases. It is therefore to be regretted that the Pennsylvania court, while declaring that there should be 'a fixed rule' for determining when a creditor was and when he was not obtaining an 'excess of insurance,' did not succeed in evolving a more satisfactory one. The truth is, there can be no sound rule on the subject which does not recognize the truth of the proposition that whenever a creditor stipulates for receiving more than indemnity upon a policy insuring his debtor's life he is engaged in a speculative venture, the gain from which, if successful, would be represented by the excess of the sum derived from the policy over the amount of the 'indebtedness' thereby secured." — *Exchange Bank v. Loh*, 104 Ga. 446, 457.

phia, in the hands of an assignee, the appellants are entitled to any preference over the general creditors of the company. The preference claimed is as to the fund of \$6,000 received on settlement or compromise, with the French corporation known as "La Caisse Generale des Assurances Agricoles et contre l'Incendie." It is unfortunate, perhaps, that the formal policy provided for in the agreement, between the Caisse Generale, etc., and the Penn Company was never issued, as the true intent of the contracting parties would doubtless have been therein more fully disclosed; but this was not done, and we must learn that intent and determine the rights of the contending parties, upon the fair "reading and construction of the executory contract, evidenced by the writings of 26th and 28th February, 1876."

In the agreement of 26th February, 1876, the receipt of \$10,000 is acknowledged; in consideration of which "a policy of insurance" is to be issued by La Caisse Generale, etc., "re-insuring the outstanding risks of the Penn Fire Insurance Company," etc.; "the amount over and above \$10,000, necessary to 're-insure' its outstanding risks to be paid," etc. In the more full and formal contract, made two days later, it is provided that the "policy of re-insurance" to be issued shall be subject to certain conditions, etc.

Re-insurance is properly applied to an insurance effected by one underwriter with another, the latter wholly or partially indemnifying the former against the risks which he has assumed; that is to say, after an insurance has been effected, the insurer may have the subject of insurance re-insured to him by some other. There is in such case, however, no privity between the original insured and the re-insurer; the latter is in no respect liable to the former, as a surety or otherwise, the contract of insurance and of re-insurance being totally distinct and disconnected. But whilst the contract is one of indemnity simply, in which the insurer is to be protected to the extent of his loss, when the loss is incurred and ascertained, the re-insurer must pay the amount. The insurer may at once, without payment to the original assured, resort to his action. *Fame Ins. Co.'s Appeal*, 83 Pa. St. 396. Even if the insurer fail, or become insolvent so that his insured receives only a dividend, however small, the re-insurer can gain nothing by this, but must pay the amount of the loss to the first insurer. *Hastie v. De Peyster*, 3 Caines, 190; *Hone v. Mut. Saf. Ins. Co.*, 1 Sand. Sup. Ct. N. Y. 137, affirmed in Court of Appeals, *sub nom. Mut. Saf. Co. v. Hone*, 2 Comst. 235; 3 Kent Com. 279; Marshall on Ins. 143. So in *Herckenrath v. Am. Ins. Co.*, 3 Barb. (N. Y.) Ch. 63. Chancellor Walworth

decided that where an insurance company has underwritten a policy, and afterwards causes itself to be re-insured, and after the loss of the property insured, such company becomes insolvent, the person originally insured has no equitable lien upon the sum of money due on the contract of re-insurance; but the fund belongs to all the creditors of the insolvent company ratably." These are familiar principles of insurance law, and are not now anywhere doubted.

If, therefore, the contract between La Caisse Generale, etc., and the Penn Fire Insurance Company was for a policy of re-insurance, properly so called, the appellants could have no preferable claim or lien upon the fund in question, although the Penn Company was admittedly and hopelessly insolvent.

It is contended, however, by the appellants that the contract in question, when read in the light of the facts attending its execution, cannot in any strict sense be considered a contract for re-insurance; that it was not intended to provide indemnity for the company, but to the individual policy-holders, and that the policy-holders can claim the advantage of this so-called re-insurance for themselves, directly and exclusively; that the term "re-insurance" was not used in its legal or technical sense, but in a different sense, defined by the particular facts which induced the creation of the contract, and that the re-insurance by the Caisse Generale, etc., was in fact, although not so expressed, a conditional assumption of the business of the Penn Company.

It was competent, we think, for the Penn Company, acting in the interest of its general policy-holders with or without authority, in view of insolvency and without fraud, to effect an indemnity for their individual protection, in case of loss (*Glen v. Hope Mut. Co.*, 56 N. Y. 379; *Fischer v. Same*, 69 N. Y. 161), which, even after loss, they might ratify and approve (*Fleming v. Mar. Ins. Co.*, 4 Wh. 59; *Stilwell v. Staples*, 19 N. Y. 405; 1 Amer. Lead. Cas. 844); and, if the insurance was in their interest, directly for their benefit, and free from any additional burden or obligation on their part, ratification might be presumed. But we fail to find anything in the words of the contract, in the special circumstances attending its creation, in the nature of the transaction itself, or in any rule of public policy, that would justify us in saying that the contract was any other than a contract of re-insurance, in the proper sense of that term. The contract was written by and between persons on both sides, actually engaged in the business of insurance, persons conversant doubtless with the meaning of terms employed in the practice of insurance, and the presumption is a fair and reasonable one, that words of technical or special import were by them prop-

erly applied. The words "re-insure" and "re insurance" would therefore seem in the first instance at least to characterize the contract and to point out the object and purpose of the parties. The proper signification of these terms would, of course, vary with the clearly manifested intention of the parties. But the contract is with the Penn Company, for a consideration moving from it providing for a policy to the Penn Company, to re-insure its risks. There is no provision whatever, expressed in the contract, for the individual indemnity of the policy-holders nor for the insurance of their property for them; the re-insurance is expressly upon the "outstanding risks" of the company. The contract of re-insurance, in some sense perhaps operates upon the property itself rather than the risk, but the fact that the policy was to be upon the "risks," indicates that it was the company's insurable interest in the property, which formed the basis of the insurance.

It is true, that except for the appellant's losses by fire, the fund of \$6,000 would not have been realized, but this is incident to all cases of re-insurance. It is true, also, that the re-insurance was of all the outstanding risks of the company, and not, as is usually the case, of any particular part of them; but whether a company shall re-insure the whole or only a part of its risks, is a question of policy for the company, dependent upon its purposes for the future, or its circumstances. If the underwriter wishes to change his business, or to quit the country, or to avert insolvency, he may choose to re-insure the whole; under different circumstance he may choose to indemnify himself as to part only. The provisions that the Penn Company "will turn over to the Caisse Generale its original registers, books, reports, and other papers, in any way relating to the policies thereby insured," and "that the Caisse Generale will assume the care and expense of the adjustment of all losses which may occur under the policies of the said Penn Fire Insurance Company, which are thereby to be re-insured," are consistent, we think, with either theory of the case — as consistent with one as with the other; and they, therefore, prove nothing either way. Such a course of proceeding may be rare, but cases are rare perhaps when the re-insurance is upon the whole list of the underwriters' risks, and where this is the case there can certainly be nothing unreasonable in the provision. We think there is nothing on the face of the contract itself, to give it the effect claimed for it, and we can discover nothing in the facts which led up to its execution, which would evidence any intention of the parties different from what is plainly expressed.

The inducing cause of the contract, doubtless, was the proceeding

instituted by the Attorney-General, at the instance of the Insurance Commissioner. After the order to suspend business, the company was permitted to effect a re-insurance of its outstanding policies, etc., for sixty days, with the hope that its available funds would prove sufficient to complete the re-insurance, at the expiration of that time. Had these hopes been realized, it is probable that the decree of dissolution, during the period of re-insurance at least might not have been entered. The commissioner, in his report refers, it is true, to this contract as an effort of the company to "secure its policy-holders by re-insurance." But if the contract were, in fact, otherwise, the report of the commissioner, subsequently made, could not change its provisions, or alter its effect. The Caisse Generale, etc., in paying certain of the losses directly to the policy-holders, would seem, subsequently to have put a construction on the contract, conformable to the appellants' claim; but the effect of this is certainly overcome by the fact that the Penn Company repudiated this payment by bringing suit against the Caisse General, etc., and the fund now for distribution is the result of that action.

To sustain the appellants' contention in this case, the facts should clearly appear, either by the contract, or otherwise in the transaction, that the indemnity provided was to the policy-holders directly, and in the absence of such proof their claim of preference must be disregarded.

The case of *Glen v. Hope Mut. Ins. Co.*, *supra*, is greatly relied on by the appellants, but that case is materially different from this. By a contract duly executed, the Hope agreed to re-insure the Craftsman Company, on all risks for which its policies were outstanding; and, also, to assume all such policies, and to pay the holders thereof all such sums as the Craftsman might, by force of such policies, become liable to pay. The engagement to the policy-holders was direct and express, and the liability was therefore direct and exclusive. This case was followed by *Fischer v. Hope Mut. Ins. Co.*, *supra*, which was another action on the same contract, and the rulings in the former case were in the latter recognized and approved.

The decree of the Court of Common Pleas is affirmed, and the appeal is dismissed at the costs of the appellant.¹

¹ "We can understand how the reinsured party, where the amount of his liability has been ascertained, may be admitted to recover to the full extent of the liability so long as the liability to pay continues, although he may not have made payment, or may be insolvent and unable to pay. But where the liability has become actually discharged by the payment of a sum less in

III. FORM OF THE CONTRACT.

a. Oral or Written.

CAMPBELL v. THE AMERICAN FIRE INSURANCE CO.

73 WIS. 100. — 1888.

ACTION upon a contract for insurance against fire.

TAYLOR, J. * * * On the trial, it was clearly established by the evidence of Burr Sprague that he was the agent of the defendant, and had full authority to take risks against fire for said company, and issue their policies covering such risks. And no contention is made on the hearing of this appeal that such agent could not have bound the company by issuing a policy of insurance upon the hay in question.

The evidence in regard to the contract of insurance is the evidence of the plaintiff and of said agent, Sprague. The plaintiff testified as follows: "I saw Mr. Sprague about that hay on the 2d day of July, 1887, about five o'clock, P. M. He was sitting on a dry-goods box in front of Terry's store. I had a conversation with him about that hay. I said 'Sprague, I have got a little baled hay that I want to get insured.' He says, 'Where is your hay?' I told him it was in Jake Bush's tobacco shed. He said, 'How far is that shed from his house?' I told him the shed was in the northeast corner of the block, and his house was in the northwest corner, — just across, opposite. He says, 'How much have you got, and how much insurance do you want on it?' I said \$500. He said, 'I can write you in the American Fire Insurance Company, the same that your ice-house was insured in;' or he first asked, 'How long do you want it?' I told him two or three months, and he says, 'You better have it for six months. It will cost you no more for six months than it will for two or three months.' 'Well,' says I, 'all right.' Says he, 'I will write you the risk for \$3.' He says, 'Really, the rates would be only \$2.50, but I cannot write a policy for less than \$3.' I says, 'That is all right; that was cheaper than I expected to get it.' I told him I was fearful about the 4th of July.

amount, it is difficult to perceive, on principle, why the sum paid in discharge of the liability should not be taken as the amount of damage sustained, and as the measure of indemnity to be recovered under a contract which is confessedly one of indemnity. Notwithstanding, then, the adverse authority that is to be found, we are disposed to hold, on principle, as we regard it, that \$600, the sum paid by the reinsured company in discharge of its liability for \$6,000, was the actual loss it sustained and the extent of the recovery which should be had."

—*Illinois Mut. Fire Ins. Co. v. Andes Ins. Co.*, 67 Ill. 365.

It was so dry that it might get on fire. 'Oh,' said he, 'I will have the policy take effect on the 4th day of July at noon.' " The 3d of July was on Sunday.

Sprague's testimony on the same subject is as follows: " On July 2d, 1887, Mr. Campbell told me he wished some insurance on some hay he had, — an amount of hay on which he wished insurance. I asked him as to the condition of the hay, whether it was loose hay or baled hay, and he said it was all baled hay. I asked him where it was. He said it was in the Bush barn, on what is known as the 'Bush block;' and I asked him how much he had there, and he said \$800 or \$1,000 worth, somewhere along there. I asked him how much insurance he wanted. He said he wanted \$500 insurance. I asked him if he pressed hay there in the barn. He said, 'No;' he pressed it away from there, and stored it there. I asked him if there was any loose hay in the barn — unpressed hay. He said, 'No.' I then asked him if he knew the distance between that barn and the house, and particularly whether it was more than 100 feet. I said to Mr. Campbell that insurance companies did not like to take insurance on barns or property in barns, except private barns in connection with dwellings, and I did not know whether the company would carry it, — the company that I had. He asked me the rate, and I asked him how long he wanted to insure. He said six months. I told him that the rate for a private barn in connection with a dwelling was the same as a dwelling, — one per cent. for three years, or one-half per cent. for one year; that this was worth more, and I would fix the rate at one-half per cent. for half a year, or \$2.50 for \$500; and then I added that companies did not like to have a policy written for less than \$3, and I would have to charge him \$3 anyway. He asked me if I would write it for that. *I said I would*, but I doubted whether the company would carry it, *but I would write it and report it*; and the company was also named. I recollect that I said to him that perhaps the *American* of Philadelphia, having his other risks, he being a patron of the company, might carry it for him. My recollection is that I said to him it was a kind of risk not desirable, and I did not know whether the company would carry it *after it was written and reported*. He had insurance in the same company at the time. I did not write any policy, or make any entries of this in my register. I didn't report it to the company till after the fire. * * * This conversation was on Saturday after the usual business hours, — after I had closed my office."

This is all the evidence given on either side in regard to the contract, and it appears to us to be conclusive upon the question

whether a contract to insure was made. The plaintiff testifies that there was an agreement to write the policy for \$500 for six months, to take effect from twelve o'clock noon on the 4th day of July, for a premium to be paid by him of \$3. The agent of the defendant testifies to the same thing, except he does not say when it was to take effect; but he does say that he agreed to write the policy for six months for the agreed premium of \$3, but is silent as to when it was to take effect; so that the only evidence on that point is the uncontradicted evidence of the plaintiff that it was to take effect at noon of July 4, 1887. The proof that the hay to be insured was destroyed by fire on the 18th of July, 1887, is not questioned, nor is there any question made as to the value of the hay destroyed. Neither is there any dispute but that the plaintiff demanded the policy after the fire, and the defendant refused to deliver it; nor that he notified the company of his loss and demanded payment before he commenced this action. The contention of the counsel for the appellant, that the evidence of the agent of the company contradicts the evidence of the plaintiff in any material point, is not sustained by the record. He admits that he agreed to issue the policy, but claims that he suggested to the plaintiff that the company might be unwilling to carry the risk after he reported it to the company. He never did report it to the company, and the company did not refuse to carry the risk before the loss occurred.

Under this evidence it is clear that if the agent had issued the policy as he admits he agreed to, the company would have been bound by it until it gave notice that it elected to cancel the same, and if no notice that it chose to cancel the same had been given before a loss, it would be too late to affect the liability of the company to the plaintiff. All the evidence on the subject of the contract being before the court, and there being no material contradiction as to what the facts were, it seems to us that the learned circuit judge was correct in directing a verdict for the plaintiff upon that question. That the evidence established a contract to insure as claimed by the plaintiff, although the premium was not paid, is settled by the decision of this court in the case of *King v. Hekla F. Ins. Co.*, 58 Wis. 508, and the case at bar is distinguished from the case of *Taylor v. Phoenix Ins. Co.*, 47 Wis. 365, exactly as the case in 58 Wis. is distinguished. This case and the case in 58 Wis. are cases where the plaintiff bases his action upon the breach of a contract to insure, and the case of *Taylor v. Phoenix Ins. Co.*, was an action upon a policy of insurance, as though issued and in force, although a policy had not in fact been issued.

That a person may maintain an action to recover damages for the

breach of a contract to insure, is well established by the authorities, and the damages in such a case is the sum which the policy was to insure, if the property to be insured, and which was destroyed by fire during the time of the life of the policy as it was agreed to be issued, was of the value to be insured by the policy. Upon this question there is no dispute. If the company is liable at all it is liable for \$500. * * *

BY THE COURT. — The judgment of the Circuit Court is affirmed.

WIEBELER *v.* MILWAUKEE MECHANICS' MUTUAL
INSURANCE CO.

30 MINN. 464. — 1883.

GILFILLAN, C. J. — Action on a contract to insure. From the admissions in the pleadings and on the trial, and from the evidence, the referee was justified in finding as he did find, that plaintiff held defendant's policy (about to expire) insuring his dwelling for three years for the sum of \$250, and that before it expired the agent of defendant, on its behalf, agreed orally with plaintiff to renew it, increasing the amount on the dwelling to \$400, and extending it so as to cover the furniture in the amount of \$250, and the barn to the amount of \$100. Nothing being said to the contrary, the presumption would be that the renewal was to be for the same length of time and the same rate of premium as in the original policy, and the referee found the fact accordingly. This makes a good contract to insure for the term of three years.

Defendant claims that the contract was within the statute of frauds and void. There is included in the statute "every agreement that by its terms is not to be performed within one year from the making thereof." This, of course, does not include an agreement that may, in accordance with its terms, be fully performed and ended within the year; as where the thing to be done depends on a contingency that may happen within the time. This is the case with a contract to insure where the insurance is to commence within the year.

Judgment affirmed.¹

¹ "Upon an oral contract of insurance, where nothing is said about conditions, if a policy is to be issued, the parties are presumed to intend that it shall contain the conditions usually inserted in policies of insurance in like cases, or as have been before used by the parties. That a particular condition is usual must be shown by the party who insists upon it, who has the affirmative." — *Salisbury v. Ins. Co.*, 32 Minn. 458.

HEBERT v. MUTUAL LIFE INS. CO.

12 FED. 807, (CIRCUIT CT. D. ORE.)—1882.

DEADY, D. J. — This suit is brought to enforce a contract for the delivery of a life insurance policy for the sum of \$15,000, and for a decree that the defendant pay the same to the plaintiff.

The bill alleges that the defendant, on June 11, 1878, and since, was and has been a corporation organized under the laws of New York, and doing a life insurance business in Oregon; that on said day Oliver Hebert, of Marion county, Oregon, the husband of the plaintiff, applied to the agents of the defendant in said county for insurance upon his life of \$20,000, payable to the plaintiff, and paid them the first quarter's premium thereon, to wit, \$105.60, which sum was by them forwarded to the defendant upon the condition "that if the amount of the risk should be reduced, a proportionate share of the premium should be refunded," and if the whole application should be rejected, it would all be refunded; that subsequently the defendant rejected \$5,000 of said application, and on August 26, 1878, remitted to said Hebert \$26.40 of said payment, and "accepted, received, and retained" the remaining \$79.20 as the premium upon the first quarter of such insurance, and in consideration thereof "did insure the life of said Hebert from such time in the sum of \$15,000," payable upon the death of said Hebert to the plaintiff; and also agreed "to issue and deliver unto said Hebert a 'plain life insurance policy' upon his own life, according to the customary form adopted and in use by the defendant, for said sum payable as aforesaid," which agreement it has hitherto neglected and refused to perform; that about September 8, 1878, at said county, said Hebert died, and the plaintiff thereupon demanded of the defendant said policy and the payment of said insurance, which was refused; and that, by reason of the refusal to issue said policy, the plaintiff is unable to "enforce her rights in an action at law," wherefore she brings this suit and prays the defendant may be required to deliver to her "a plain life insurance policy" upon the life of said Hebert for the sum aforesaid, to take effect from the date of said contract aforesaid, and payable to the plaintiff, and for a decree against the defendant for said sum of \$15,000, with interest.

The defendant demurs to the bill because (1) the plaintiff, upon the case stated, is not entitled to the relief prayed for; (2) the policy is not sufficiently described; and (3) the plaintiff has an adequate remedy at law.

The jurisdiction of a court of equity to compel the specific performance of a contract for insurance is well established. The policy

cannot be obtained by an action at law, although one might be maintained upon it for the insurance after it is issued. But a court of equity having taken jurisdiction for the purpose of compelling the delivery of the policy, will retain it where there has been a loss or death, for the purpose of decreeing payment of the policy, both to avoid expense and because the latter relief is a mere incident of the former. *Ang. F. & L. Ins.* 34; *Perkins v. Washington Ins. Co.*, 4 Cow. 645; *Carpenter v. M. S. Ins. Co.*, 4 Sandf. Ch. 408; *Brugger v. S. I. Ins. Co.*, 5 Sawy. 304. Nor does there appear to be any uncertainty as to the nature of the contract, or the form or effect of the policy, as stated in the bill. The agreement was for "a plain life insurance policy" upon the life of the deceased for \$15,000, payable to the plaintiff "according to the customary form adopted and in use by the defendant," for which it was paid and had received one quarter's premium.

If there is any reason not appearing on the face of the bill why the defendant should not be compelled to perform its contract, as that it was procured by fraud or falsehood, the defendant can set it up as a defense.

The demurrer is overruled.

b. The Standard Policy.

HICKS v. BRITISH AMERICA ASSURANCE CO.

162 N. Y. 284. — 1900.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 8, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

This action was brought to recover on an alleged oral contract to insure a certain building in the village of Penn Yan, entered into between George C. Hicks, the plaintiff's assignor, and Melmoth Hobart, the agent of the defendant.

PARKER, Ch. J. We are agreed that the verdict of the jury establishes that on the 30th day of December, 1893, defendant's agent Hobart had a conversation with Colonel Hicks, plaintiff's assignor, the legal effect of which was to create a contract of present insurance in the sum of \$2,500.00 upon property of Colonel Hicks, which was consumed by fire two days later. The agreement that the contract was one of present insurance accords with the allegations of the complaint, the theory of the counsel as shown by their method of

trial and the charge of the court. That position cannot be attacked from any source, for either that which was said operated to create a contract of present insurance, or else no contract was ever made binding upon the defendant. The evidence tended to show a contract to insure, and nothing else. It is not pretended that a contract of any kind between these parties was made after the conversation of December 30th. The jury have found that the defendant's agent said to Hicks, after a general discussion on the subject of insuring the property, "you are insured from noon on the 30th day of December, 1893, to noon of December 30th, 1894." The legal effect of this answer to the application for insurance made by Col. Hicks was to create a complete, binding agreement for insurance for the period named, upon which he was entitled to recover for the damages sustained by the fire had he made performance on his part. *Ruggles v. American Central Ins. Co. of St. Louis*, 114 N. Y. 415. This contract of insurance, although verbal, embraced within it the provisions of the standard policy of fire insurance, which the legislature in its wisdom formulated for the protection of both insured and insurer. It is usual for the company to issue a policy of insurance evidencing the contract between the parties; but the policy accomplishes nothing more than that, for when the contract is entered into between the agent and the owner, whether the binder be verbal or in writing, it includes within it the standard form of policy and the contract is a completed one. *Ruggles Case, supra*; *Lipman v. N. F. Ins. Co.*, 121 N. Y. 454; *Karelsen v. Sun Fire Office*, 122 N. Y. 545; *Underwood v. Greenwich Ins. Co.*, 161 N. Y. 413. In the three cases last cited the binder had been reduced to writing; but there is no distinction whatever in principle between those cases and the one at bar, for in each there is a binding contract to insure, and necessarily according to the only form of insurance contract authorized by the laws of this state. The law reads into the contract the standard policy, whether it be referred to in terms or not. In *Lipman's Case, supra*, Judge Andrews, in speaking of the construction to be put upon the binding slip issued in that case, said: "The construction is, we think, the same as though it had expressed that the present insurance was under the terms of the usual policy of the company to be thereafter delivered." And in *Karelsen's case* the court said: "While the binding slip contained none of the conditions usually found in insurance policies, the contract evidenced by it was the ordinary policy of insurance issued by the company. So that, in any construction of the contract, it must be regarded as though it had expressed that the present insurance was under the terms of the usual policy of the company to be there-

after delivered." So that all this plaintiff had to do in order to recover in this action, aside from showing a loss by fire and compliance on her part with the conditions of the contract, was to prove the making of the contract. This was accomplished by proving the conversation between her assignor and the agent; for the conversation disclosed the sum for which the property was to be insured, the amount of premiums and the period of insurance, and the statute provided for all of the other conditions of the contract of insurance. Neither party to it had the right to add to, or take from, the requirements of the legislature in that regard. The making of the contract the plaintiff proved to the satisfaction of the jury, and she did not attempt to prove anything more. This the trial court, as well as the counsel, understood, and the case was tried upon that theory. It has been discovered in this court, however, that the judgment against the defendant cannot be sustained if this action be now treated in accordance with the theory that induced its commencement and upon which it was tried, namely, that the plaintiff's assignor made a valid contract of insurance with the defendant by virtue of which this plaintiff, as assignee, is entitled to recover to the extent provided for by the policy for the damages sustained by her through the destruction by fire of the building insured. The error which calls for a reversal of the judgment, if this be treated as an action on the contract, lies in the trial court's charge to the jury, in effect, that, as matter of law, it was not necessary for the insured to present to the defendant proofs of loss in accordance with the requirements of the standard policy. To avoid this result it is proposed in the dissenting opinions not only to set at naught the many decisions of this court, holding that on an appeal a case must be disposed of upon the theory upon which it was tried (*Snider v. Snider*, 160 N. Y. 151; *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178; *People ex rel. Warschauer v. Dalton*, 159 N. Y. 235; *Drucker v. Manhattan Ry. Co.*, 106 N. Y. 157; *Baird v. Mayor, etc.*, 96 N. Y. 507), but, also, to decide that growing out of this contract the plaintiff had another cause of action, the maintenance of which did not require the service of proofs of loss. Hence, it is claimed that, by treating the case as having been tried upon that theory, the court may avoid reversing the judgment, for in such a case it would have been unnecessary to charge that the service of proofs of loss was essential to recovery. This newly discovered cause of action is said to spring out of the promise made at the time the contract was entered into, that the defendant would deliver to the insured evidence of the contract in the shape of a policy of insurance. The contract was completed at the moment the agent said, "you are

insured from noon on the 30th day of December, 1893, to noon on the 30th day of December, 1894" (*Ruggles v. Amer. C. Ins. Co., supra*), and it is agreed by every member of this court that the defendant is liable to the plaintiff on the contract thus made in the full amount of the policy, if the damage was sustained in the manner referred to in the policy, and plaintiff performed the conditions imposed upon him by it. But it is said that he may recover either on the contract, or, instead, if he elects, on the ground that the defendant failed to deliver to him written evidence of the contract, *i. e.*, a policy of insurance.

If the case were one where the written evidence of the contract had to come into the possession of the plaintiff before recovery could be had thereon, then it is true that an action in equity might be brought, praying for a delivery of the policy that the defendant withheld, and further demanding that upon the policy delivered in pursuance of the decree the plaintiff should have judgment in the amount specified in the policy for her damages by fire, and even then the plaintiff would have to abide by the terms of the policy, delivery of which the judgment should decree. But that is not this case at all. To enable her to recover it was not necessary for this plaintiff to have physical possession of the policy which the agent promised to give her assignor. *Ruggles Case, supra*. Her action was not founded upon a policy, but upon the contract of insurance made upon the 30th day of December, which, as both parties agreed, was to begin at noon on that day, no matter when the policy, which the parties intended should furnish evidence of the contract, should be delivered. The action was brought, tried and decided upon that theory, and no one disputes that the judgment could in this court stand upon that theory had the trial court charged the jury correctly in relation to the necessity of serving proofs of loss. It is apparent, therefore, that the plaintiff sustained no damage by reason of the defendant's failure to furnish her assignor with written evidence of the contract. Had the promise been kept, the plaintiff might not have been obliged to call her assignor to prove the contract, thus subjecting him, as it turned out, to be confronted with impeaching testimony; but neither the plaintiff nor her assignor was otherwise damaged, for he found no difficulty in proving a contract to the satisfaction of the jury. The possession of the promised policy, therefore, would have been a convenience possibly, but nothing more.

Plainly, therefore, it is not true that the plaintiff suffered damage in the amount of the contract of insurance by reason of the failure of the defendant to deliver a policy reciting the terms of the con-

tract entered into, and hence the judgment cannot be affirmed on the ground that the plaintiff sustained damages in the sum of \$2,500.00, because the defendant omitted to deliver a policy. Nor do I think that a sound public policy would sanction the creation of such a precedent even if a legal principle could be found upon which to rest it.

The Legislature of the State of New York has prescribed a standard form of policy for the protection of both insurer and insured. It contains provisions specially protecting the insured from harsh methods by insurance companies. On the other hand, it provides that which experience has shown to be necessary in order to protect insurance companies from being victimized through fraud, and among the conditions which the Legislature in its wisdom has caused to be incorporated into the standard policy is one making it necessary that the insurer shall have immediate notice of the facts and circumstances of the fire; another that within sixty days the owner shall present proofs of loss, duly verified, in which shall be stated the circumstances of the fire and the value of the property destroyed and various other things which it is deemed important that insurance companies should know before being called upon to adjust a loss; still another provides that no local agent shall have the power to waive any of these written conditions, except by a writing. It is unnecessary to present the reasons which induced the Legislature to require these conditions precedent to a recovery upon a policy of insurance; it is sufficient for our purpose that the Legislature declared that it should be so, and we should see to it that the general trend of our decisions is towards the enforcement of the legislative command instead of its nullification. This plaintiff had the right, as it is conceded on all hands, to recover on the contract of insurance which her assignor made with the defendant's agent, whether a policy was subsequently delivered to him or not; but as the standard policy was necessarily a part of the contract, he should be required to comply with the conditions of that policy and give notice of the facts and circumstances of the fire and present proofs of loss duly verified. The view taken by some of my brethren, however, is that it was unnecessary to give notice of the fire and present proofs of loss within sixty days, or at any other time, because, it is said, such an action need not be treated as on a contract of insurance, but on a contract to give a policy, which has not been carried out, and, therefore, prior to beginning suit, which may be done at any time within six years instead of one year, as provided in the standard policy, the insured has nothing whatever to do when he sustains a loss by fire but lie by until, as in this case, several months

have passed, or, in some other case, until years have gone by, without giving the company notice of the fire or any proofs of loss whatever; he may then bring a suit claiming that two days, or less or more, before the fire, the defendant's local agent, without receiving any premium, agreed to, but did not, issue a policy, for which defendant is liable to plaintiff in the amount of the sum for which it was agreed that the policy should issue. If such a procedure should be sanctioned by this court, then might an insurance company be mulcted in damages without having had an opportunity to investigate promptly the origin of the fire and the value of the thing destroyed, and thus would the door be opened wide for the perpetration of fraud.

It is said that if the foregoing argument seems not to be defective upon its mere reading, it is nevertheless so because it leaves out of consideration the decisions of this court in *Ellis v. Albany City Fire Insurance Co.*, 50 N. Y. 402; *Angell v. Hartford Fire Insurance Co.*, 59 N. Y. 171; *Van Loan v. Farmers' Mutual Fire Insurance Assn.*, 90 N. Y. 280. But the situation which those cases were designed to meet no longer exists. During the period of time in which they and others were decided, and down to the year 1886, each insurance company was at liberty to insert such provisions in the policy of insurance issued by it as it deemed best. The result was that there was no uniformity in policies of insurance, and when loss by fire occurred, prior to a delivery of the policy, it became necessary for the assured to secure possession of the policy, either by its voluntary delivery to him by the officers of the company, or in pursuance of a decree in a suit in equity for specific performance; thereon he could found a judgment for the damages sustained by the fire, or he was allowed to recover the damages sustained for a breach of the contract which was treated as a contract for the delivery of a policy. The last one of the cases cited was decided in 1882; four years later the Legislature, by chapter 488 of the Laws of 1886, enacted and provided for a uniform policy of fire insurance, to be made and issued in this State, by all insurance companies taking fire risks on property within this State, to be known and designated as the "Standard Fire Insurance Policy of the State of New York."¹ Upon the passage of this important legislation, the policy of insurance was no longer of special moment

¹ The New York Penal Code, § 577d, makes it a misdemeanor for "any fire insurance corporation or any officer or agent thereof" to issue any fire policy except the "Standard fire insurance policy of the State of New York," violation of the provision being punishable by a fine.

except as evidence that a contract to insure had been made; for it was no longer competent for the parties to incorporate into the policy any provisions whatever, outside of those embraced within the terms of the standard policy, and thereafter the contract to insure was by common consent of the profession and the courts scientifically treated as a contract of insurance, and not, as formerly, a contract to issue a policy, as an examination of the authorities in this court from the *Ruggles* case down will show.

[*Here follows a discussion as to whether the proofs of loss were waived.*]

It is plain, therefore, that the plaintiff is without a basis for a recovery upon this cause of action, if a new trial be granted, because neither she nor her father, the assignor, have presented to the defendant any proofs of loss, nor was service of proofs of loss waived by the defendant; and while such a result may or may not be in the interest of justice, in this particular case there can be no doubt that the measure of injustice done, if any, will be far less than would necessarily ensue from a decision putting a premium upon insurance obtained without a policy, by making it possible to recover for the damages sustained through a fire, by an action commenced at any time before the six years' Statute of Limitations shall have run, and that too without giving the company notice of the fire or serving it with proofs of the loss, thereby preventing it from being able to inquire about the facts and circumstances attending the fire until months or years after the happening of it. This would in many cases effectually prevent the company from acquiring any information whatever.

It follows, if the views expressed be sound, that the action is upon a contract of insurance and not one for damages resulting from a failure to deliver a policy, and, hence, that proofs of loss were necessary in the absence of a waiver thereof by the defendant, of which there is no proof, and the failure to so charge was error, calling for a reversal of the judgment.

The judgment should be reversed.

LONDON, J. (dissenting). * * * The complaint may be construed as seeking either a recovery of damages for the breach of a contract to issue a policy of insurance, or to enforce its delivery and to recover thereon as if actually delivered. * * *

If the action were solely to enforce the delivery of the policy and to recover thereon as if actually delivered, then service of proofs of loss would be necessary, since in such case the rights of the insured would depend upon his performance of the conditions expressed in the policy as precedent to his right of recovery. *DeGrove v. Metrop. Ins. Co.*, 61 N. Y. 594. The same would be true

if the action were to recover upon an agreement for temporary insurance intermediate the application for it, and the decision of the insurance company, whether it will issue a policy, as in the cases of "binding slips." *Lipman v. Niagara Fire Ins. Co.*, 121 N. Y. 454; *Karelsen v. Sun Fire Office*, 122 N. Y. 545. In the two cases last cited the insurance company did not repudiate the binding slip, but claimed to have canceled the contract according to its terms. Recovery was sought in each case under the contract, and not because the agreement to make it was repudiated. In the case of a binding slip the insured has his written contract; and in the case of an oral contract he must show his right to one. In the one case the contract speaks for itself, and the action is upon the contract, which for the time being is the policy. In the other case the action may be upon the oral contract, but when the making of the contract is denied and performance by the company, therefore, refused, the action may be for damages for the breach of the contract to deliver the policy as of the date orally agreed upon. The right to the policy is not affected by the fire. *Ins. Co. v. Colt*, 20 Wall. 560; *Lightbody v. North Am. Ins. Co.*, 23 Wend. 18.

We may regard this action as one for the recovery of damages consequent upon the breach by the defendant of its contract to issue and deliver the policy, which, if delivered, would have enabled the plaintiff, by complying with its conditions, to secure indemnity for his loss. If the defendant repudiated the contract to issue the policy, it repudiated its conditions, and, therefore, cannot, without showing that it retracted its repudiation, insist upon the subsequent performance by the insured of any of them as a condition precedent to his recovery of the damages accruing to him then or thereafter by the completed breach itself. The defendant did not retract the repudiation of the contract, but by its answer repeated and confirmed it. *Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286; *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696; *Meyer v. Knickerbocker Life Ins. Co.*, 73 N. Y. 516; *Robinson v. Frank*, 107 N. Y. 655; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390; *Post v. Aetna Ins. Co.*, 43 Barb. 351.

It would be a useless act for the plaintiff to serve proofs of loss in order to charge the defendant with liability under a contract which it repudiated altogether, and to hold otherwise would be to absolve the offender and punish its victim. As the plaintiff did not commence this action until after seven months after the fire, no question arises whether the action for full damages could accrue upon the breach earlier than under the contract.

If we treat the case as if the policy had been issued, it was not

within Hobart's power thereafter to waive proofs of loss, because his power was limited to the making of the contract and delivery of the policy, and did not extend to a subsequent waiver of the conditions which the policy imposed upon Hicks. But as his power was complete over the making of the contract and delivery of the policy, it embraced as its necessary incident power to repudiate the oral contract and thereupon to refuse delivery of the policy, and hence his repudiation and refusal, if made, were the acts of the defendant. In *Ellis v. Albany Ins. Co.* (*supra*) the court not only so held, but also considered the suggestion, renewed in this case, that such a rule would enable the agent to perpetrate a fraud upon the company by making preliminary contracts, when the company only intended to be bound by writing, and answered it by saying that that was no reason for depriving third persons of the benefit of contracts entered into with the agent. We cannot review the finding that the defendant, through Hobart, did repudiate the contract and refuse to issue the policy.

The charge of the court placed the waiver of the proofs of loss and the lack of necessity to furnish them upon the same finding of facts by the jury. The court was wrong as to the waiver of the proofs, if plaintiff had no right of recovery except under the policy; but upon the same facts the court was right in saying, if the agent claimed that no contract was made, they were not necessary.

As the jury found the facts which made the service of proofs of loss unnecessary, what was said as to waiver was unimportant, and not reversible error.

It is said that the plaintiff sustained no damages by the defendant's breach of its contract to deliver the policy, because she had her remedy upon the oral contract to insure. It could be said with equal force that she had no remedy upon the oral contract to insure because she had her remedy for damages. Obviously she could stand upon all the causes of action which the facts pleaded permitted, and finally avail herself of the one proved. The form of the policy is fixed by statute, but that simply affects ease of proof, and not the remedy upon the proofs. * * *

WERNER, J. (dissenting.) — It seems to me that we cannot hold that an action may not be brought for the breach of an agreement to insure without distinctly overruling *Ellis v. Albany City Fire Insurance Company*, 50 N. Y. 402; *Angell v. Hartford Fire Ins. Co.*, 59 N. Y. 171; *Van Loan v. Farmers' M. F. Ins. Assn.*, 90 N. Y. 281, and *Post v. Aetna Ins. Co.*, 43 Barb. 351. I do not think that the evidence wholly justifies the statement that the action was clearly tried upon the theory of an executed contract of insurance. It is

true that the complaint, and the evidence given in support thereof, were undoubtedly appropriate to such an action; but it does not follow that they were, therefore, not appropriate to an action for damages arising out of the alleged breach of the contract to insure. It frequently happens that the same pleadings and proofs will support different causes of actions which are governed by inconsistent legal principles. I am prepared to agree with Chief Judge Parker in holding that under the law providing for the standard policy it is the logical rule to decide that every contract for insurance made with an authorized agent, whether the same be oral or written, constitutes a valid contract of insurance which requires nothing to complete it except the written evidence of its terms and conditions. The cases of *Lipman v. N. F. Ins. Co.*, 121 N. Y. 454; *Karelsen v. Sun Fire Office*, 122 N. Y. 545, and *Underwood v. Greenwich Ins. Co.*, 161 N. Y. 413, cited by him, clearly demonstrate that this is the more recent view of our court. But that is very different from deciding that, when a plaintiff claims that a contract for insurance has been made and broken, and a defendant insurance company denies that any such contract was ever made, a plaintiff can recover only upon the theory of an executed and completed contract. Such a rule would result in exempting insurance companies from the application of one of the most familiar principles of the law of contracts. It is a rule of universal application that when a party to a contract refuses to execute it, the other party thereto may treat it as rescinded and sue for the breach. Beach on Modern Law of Contracts, § 788. In such a case as this the difference in the character of the action is one of form rather than of substance, because the recovery in either case would be the same. But let us assume that it is now the established law that a party claiming under an oral or a written memorandum for insurance must recover, if at all, upon the terms and conditions of a completed policy which are to be read into his tentative contract. It is conceded that Hobart was the duly authorized agent of the defendant for the purpose of issuing policies of insurance. He was provided with blanks for that purpose, which needed only to be countersigned by him to make them executed and binding contracts. The right to issue policies included the right to refuse to issue them. Hobart's agreement to issue a policy was the act of the company. Whose act was Hobart's refusal to issue a policy after he had bound the company by his agreement to issue one?

To my mind there is no escape from the conclusion that if he acted for the company in making the agreement, he acted in the same capacity in breaking it. There was a dispute of testimony as

to whether he ever made such an agreement with plaintiff's assignor. This presented a question of fact which the jury have settled in favor of the plaintiff. If, then, we treat this as an action upon the policy, and hold the defendant responsible for the acts of Hobart, what is the effect of such acts. The answer seems obvious. If the defendant, through its proper officers, had issued a policy of insurance, and after a loss under the same, had denied its liability on the ground that it never made any such contract, it would be a distinct waiver of the right to demand proofs of loss. *Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286; *Stokes v. Mackay*, 147 N. Y. 223; *People v. Empire Mut. Life Ins. Co.*, 92 N. Y. 105; May on Insurance, § 469; Porter on Insurance (American Notes by Darrach, 1889), star page 194; Richards on Insurance, § 81; *Grattan v. Met. Life Ins. Co.*, 80 N. Y. 281; *Payn v. Mutual Relief Society*, 6 N. Y. S. R. 365; *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696; *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 113.

Is the result any different because these things were done by an agent. As we have seen, this agent had authority to issue, and, therefore, to refuse to issue policies. His agreement to issue a policy was the act of his principal. His refusal to issue a policy after he had agreed to do so falls within the same category. Under these circumstances the refusal of the agent has the same effect as though it had actually been made by the principal. Indeed, for the purposes of the particular act, he was the principal. *Goodwin v. Mass. Mut. Life Ins. Co.*, 73 N. Y. 490, 491.

But it is suggested that the policy provides that no agent shall have power to waive any of the conditions thereof. This is undoubtedly true after a policy has been issued, and the limited powers of the agent are spent. But in the case before us, the acts of the agent were within the scope of his authority, for until the policy was actually issued he was the *alter ego* of the defendant. At every instant, within the period covered by the negotiations between Hobart and the plaintiff's assignor, the former was acting within the scope of his authority. As the case stands, it is just as though the defendant itself had refused to issue a policy after it had agreed to do so. Under these circumstances the plaintiff and her assignor were not required to present proofs of loss, because they had been absolved from this duty by the acts of the defendant.

If these views are adopted, it follows that the charge of the trial court was substantially correct, wherein it stated that it was not necessary for the plaintiff to serve proofs of loss; and by the same rule it would seem to follow that the instructions relating to the waiver by Hobart were harmless because they were immaterial.

GRAY, O'BRIEN and CULLEN, JJ., concur with PARKER, Ch. J., for reversal. LANDON and WERNER, JJ., read for affirmance and HAIGHT, J., concurs with LANDON, J.

Judgment reversed, etc.

IV. CONSIDERATION.

GRAY, J., IN PHOENIX LIFE INSURANCE CO. *v.* RADDIN.

120 U. S. 183, 196. — 1887.

THE only objection remaining to be considered is that of variance between the declaration and the evidence, which is thus stated in the bill of exceptions: "After the plaintiff had rested, the defendant asked the court to rule that there was a variance between the declaration and the proof, inasmuch as the declaration stated the consideration of the contract to be the payment of the sum of \$152.10, and of an annual premium of \$304.20, while the policy showed the consideration to be the representations made in the application as well as payment of the aforesaid sums of money, and that an amendment to the declaration was necessary; but this the court declined to rule, to which the defendant excepted."

But the "consideration," in the legal sense of the word, of a contract, is the *quid pro quo*, that which the party to whom a promise is made does or agrees to do in exchange for the promise. In a contract of insurance, the promise of the insurer is to pay a certain amount of money upon certain conditions; and the consideration on the part of the assured is his payment of the whole premium at the inception of the contract, or his payment of part then, and his agreement to pay the rest at certain periods while it continues in force. In the present case, at least, the application is collateral to the contract, and contains no promise or agreement of the assured. The statements in the application are only representations upon which the promise of the insurer is based, and conditions limiting the obligation which he assumes. If they are false, there is a misrepresentation, or a breach of condition, which prevents the obligation of the insurer from ever attaching, or brings it to an end; but there is no breach of any contract or promise on the part of the assured, for he has made none. In short, the statements in this application limit the liability of the insurer, but they create no liability on the part of the assured. The expression at the beginning of the policy, that the insurance is made "in consideration of the representations made in the application for this

policy," and of certain sums paid and to be paid for premiums, does not make those representations part of the consideration, in the technical sense, or render it necessary or proper to plead them as such.¹

V. CONSUMMATION OF THE CONTRACT.

MACHINE CO. *v.* INSURANCE CO.

50 OH. ST. 549. — 1893.

THE action below was brought by the Newark Machine Company against the Kenton Insurance Company of Kentucky to recover the amount of a policy of fire insurance. The issue tried was whether the contract of insurance had been consummated by the parties. The plaintiff prevailed in the Court of Common Pleas; but the judgment there obtained was reversed by the Circuit Court, and error is prosecuted here to the judgment of that court.

WILLIAMS, J. The facts of the case, as shown by the record, and about which there is no controversy, are substantially as follows: On the 30th day of June, 1884, the plaintiff, a corporation, owned and was operating a large manufacturing plant in the city of Newark, and had been the owner and operator of it for several years. The defendant, a fire insurance company, then had an established

¹ Some courts hold that the contract of insurance is a unilateral one, the consideration of which is the payment of the first premium; the contract being subject to the condition subsequent that unless the subsequent premiums are paid the contract shall be of no effect. "The contract of life insurance has its inception in the issue of the policy, and is a complete and entire contract for the life of the assured, continuing during life, and payable at death, when no earlier definite period is fixed, but subject to be discontinued by non-payment of the premiums as agreed, such payments being conditions subsequent. The annual premium is not paid in consideration of insurance for a single year, and its payment is not a condition precedent to renewal. Each premium constitutes a part of the consideration of the contract, as one and entire, and the amount is fixed and regulated by the prospective duration of the life of the assured, which enters as an element into the contract."—*Fearn v. Ward*, 80 Ala. 555, 563. *Contra*: "The applicant, upon the payment of the first premium, effects an insurance upon his life for one year, and purchases a right to continue that insurance from year to year, during life, at the same rate. Whether he will continue it or not is optional with him. The premium for the first year pays for the risk during that year, and for the right to subsequent insurance. The rate of insurance for a single year is less than the annual premiums on a life policy. The difference, continued, as it is supposed it will be, from year to year through life, may be regarded as the consideration for the right to continue the insurance."—*Worthington v. Ins. Co.*, 41 Conn. 372, 399.

See also *Premiums*, *post*, p. 135.

agency in Newark, in the charge of H. D. Murphy, who was also the agent of a number of other fire companies, among them the Norwich Union Company. He was a regularly commissioned agent of these companies, and was provided by them with blank applications, and policies duly signed by the proper officers, to be filled up and countersigned by him as agent, and delivered in the course of the business of his agency, and also with registers in which to keep a record of the business, and blanks for making reports of the same to the respective companies. He had, during the existence of his agency, issued a large number of policies of different companies represented by him to the plaintiff, insuring its buildings, machinery, and stock against loss or damage by fire, one of which was a policy on the stock for \$5,000 in the Norwich Union, issued a short time prior to June 30, 1884. There was an understanding between the managing officer of the plaintiff and Murphy that the latter should keep the insurance of the plaintiff up to a certain amount, either by renewals or new policies in good companies represented by him; and his course of dealing with the plaintiff under that understanding was to charge up the amount of the premiums to the plaintiff when policies were issued or renewed, and have periodical settlements, usually once a month, when the premiums would be paid. The Norwich Union, not desiring to carry so large an insurance on the plaintiff's stock, a few days prior to the 30th of June, 1884, directed Murphy to reduce its risk to \$2,500. He thereupon, on the 30th day of June, 1884, filled up for that amount one of the blank policies which that company had furnished him, duly signed by its proper officers, and countersigned it as agent, and at the same time filled up, for the same amount, one of the blank forms of policy with which the defendant company had supplied him, duly signed by its officers, and countersigned the same as its agent, ready for delivery. He made the customary entries of the issuing of the policies in the registers of the respective companies, and in that of the Norwich Union an entry also of the cancellation of the \$5,000 policy, in place of which the two policies he had so filled up were intended to be substituted. On the 2d day of July, 1884, he forwarded to the defendant at its home office in Covington, Ky., what is called a "daily report," in which he gave the number of the policy he had written for the plaintiff, its date, amount, and duration, the rate and amount of the premium, a description of the property insured, and other particulars of the risk. This report was received at the home office July 3, 1884. The premium on the \$5,000 policy had been fully paid by the plaintiff, and when the entry of its cancellation was made the policy had run but

a short time. The unearned or returned premium was carried to the credit of the plaintiff on the books of the agent, and the amount of the premiums due on the two new policies was charged to the plaintiff by the agent in accordance with his previous custom. At the next regular settlement between the plaintiff and the agent, which was made July 7, 1884, there was due him from the plaintiff, on account of premiums on various policies, the sum of \$438.55, which amount included the balance due on the policy of the defendant. The amount due on the account was then paid by the plaintiff. When the policy of the defendant was written, and the cancellation entered of the Norwich Union policy, the latter was in the possession of F. S. Wright, cashier of the First National Bank of Newark, as collateral. Wright was also vice-president of the plaintiff, and looked after its insurance. On the 30th day of June, 1884, after writing and executing the two new policies, and entering the cancellation of the one for which they were intended to be substituted, the agent called at the bank to see Mr. Wright, take up the policy so held by him, and deliver the new ones in its place. Wright was absent, and the agent failed to see him. He called several times within the next day or two with like results, and did not see Wright until the evening of July 3, 1884, after the bank had closed. The agent then informed Wright that at the request of the Norwich Union Company he had canceled its policy for \$5,000 which Wright then held, and issued to the plaintiff in its place two other policies for \$2,500 each, which he proposed to deliver, and take up the canceled policy. Wright replied that was all right; all he wanted was to have it so that the amount was the same; and he (the agent) could call at the bank any time when it was open, and make the exchange, and if he (Wright) was not in, the person in charge would make the exchange for him. There appears to have been no reason why the exchange was not made at the time of the interview on the evening of July 3d, except that the bank was then closed. No claim was thereafter made by the plaintiff to the canceled policy; nor was there any question, at the trial, of Wright's authority to act for the plaintiff, or of that of the agent, Murphy, to act for the defendant. The property was totally destroyed by fire on the 5th day of July, 1880. At that time the new policies had not been actually delivered, or the old one taken up. Immediately after the fire, the defendant was notified of it by telegram from the agent, who received from the defendant the following response: "Yours received. Have telegraphed you for list of companies on stock with us. The list sent to Cincinnati made no mention of Kenton, and we were willing to be ignored. George C. Coker, Secretary."

It was admitted on the trial that proof of the loss was duly made and filed with the defendant; that Wright then had no interest in the claim; and, if the plaintiff was entitled to recover, the amount of the recovery should be \$2,500, with interest from September 30, 1884.

It does not appear that the names of the companies in which the new policies had been written were mentioned in the interview between Wright and the defendant's agent, nor the rate or amount of the premium, nor the duration or conditions of the policies; and it is claimed by the defendant that there was, therefore, no mutual assent of the parties to either of those terms, and so no completed contract of insurance between them. It is undoubtedly true that those are essential elements of a contract of insurance, and, if there was not a meeting of the minds of the parties upon them, the contract was not consummated, and no risk attached. But it is equally true that the agreement need not be expressed in words; it may be implied from the circumstances, and conduct of the parties.

If the case of *Cockerill v. Insurance Co.*, 16 Ohio, 148, in which it was held that a policy of insurance, to be valid, must be in writing, was not virtually overruled by the case of *Insurance Co. v. Kelly*, 24 Ohio St. 345, as it was said to have been by OKEY, J., in the case of *Insurance Co. v. Wall*, 31 Ohio St. 633, it has been so qualified by these subsequent cases as to limit the rule it announced to policies in their strict technical sense, and leave unaffected by it parol contracts of insurance.

It is now well settled that a policy is only evidence of the contract, and the latter may be shown by parol, when the policy has not been written, or is withheld, unless such contract is forbidden by statute or a provision of the company's charter which is brought to the notice of the other contracting party, (Ostr. Ins. §§ 13, 14; Richards Ins. § 140; *Insurance Co. v. Shaw*, 94 U. S. 574; *Insurance Co. v. Kelly*, *supra*; *Palm v. Insurance Co.*, 20 Ohio, 529, 537) and, as in other cases of parol contracts, the terms of the agreement, and the assent of the parties to them, may be shown by their acts and the attending circumstances, as well as the words they have employed. There was, in this case, no express agreement in regard to the property to be insured by the new policies. The property was not mentioned in the interview between the defendant's agent and Wright. But, as it was agreed the new policies were to be exchanged for the canceled policy, it must have been as clearly understood as if it had been expressly stated that they were to cover the property included in the canceled policy. So, in regard to the rate and amount of the premium, and form and conditions

of the policy. It is not claimed that the conditions of the defendant's policies, or its rate of insurance, are different from those of like companies; and it is generally known that the form and conditions of fire policies in use by good companies do not differ substantially, and the rates of insurance are established and uniform on the same classes of property. And, where nothing is said in the negotiation for insurance about special rates or conditions, it may be presumed that those which were usual and customary were intended. In *Richards on Insurance* (2d ed. § 42) it is laid down as a general rule that, "whether the contract of insurance is closed by parol or by a preliminary binding receipt, the legal presumption is that the usual policy is to follow." And in the preceding section the same author says that it is not necessary that all the particulars of a contract should be made the subject of express stipulation, "for it may well be understood, in the absence of express declaration to the contrary, that the usual form of policy is acceptable to both parties." It was held by the Supreme Court of Minnesota, in *Salisbury v. Insurance Co.*, 32 Minn. 460, 21 N. W. 552, that "upon an oral contract of insurance, where nothing is said about conditions, if a policy is to be issued, the parties are presumed to intend that it shall contain the conditions usually inserted in policies of insurance in like cases." And in *Eames v. Insurance Co.*, 94 U. S. 629, Mr. Justice Bradley says: "It is sufficient if one party proposes to be insured, and the other party agrees to insure, and the subject, the period, the amount, and the rate of insurance is ascertained or understood, and the premium paid if demanded. It will be presumed that they contemplate such form of policy, containing such conditions and limitations, as are usual in such cases, or have been used before between the parties. This is the sense and reason of the thing, and any contrary requirement should be expressly notified to the party to be affected by it."

Upon the facts of the present case there can be but little doubt that the contract of insurance made by the defendant, through its agent, with the plaintiff, was complete in all its terms. The plaintiff had previously arranged with the agent to keep its insurance up to a certain amount in good companies, for which he was authorized to act. This arrangement virtually left the selection of the companies to the discretion of the agent; and, acting under it, he had written the policy of the defendant and the new policy of the Norwich Union Company, each for \$2,500, and duly countersigned both, ready for delivery to the plaintiff, and entered the cancellation of the policy which Wright had in his possession before the interview of July 3d. The policy of the defendant was then complete.

containing a description of the property, the amount, commencement and duration of the risk, the rate and amount of the premium, and all the terms and conditions usual in such policies. This policy, and the new policy of the Norwich Union, the agent proposed to Wright to exchange for the canceled policy, without condition or qualification. The proposition was immediately assented to and accepted without any qualification or condition whatever. The terms of the contract of insurance thus proposed by the defendant, through its agent, were definite and certain in every particular. They were those set forth in the policy. The acceptance was as broad as the proposition, and was, therefore, an acceptance of all the terms and conditions of the policy as it was written. That the plaintiff chose to accept the proposition unqualifiedly without further inquiry or examination affords the defendant no ground for claiming the contract was, on that account, incomplete. The only reason the exchange was not made was that the canceled policy was locked up in the bank. The parties evidently regarded the exchange as complete, and thereafter the agent was a mere custodian of the policy in question for the plaintiff, and the actual handing of it over was not essential to the risk. Effect will be given to the intention of the parties, and what their conduct shows they considered a delivery must control in determining whether it was made. *Bid. Ins.* § 149; *Dibble v. Assurance Co.*, 70 Mich. 1, 37 N. W. 704; *Bodine v. Insurance Co.*, 51 N. Y. 117; 11 Amer. & Eng. Enc. Law, p. 285. It is quite evident the agent considered the policy of the defendant in full force. He reported it as such to the company; and that the latter so treated it, even after the fire, is shown by its telegram to the agent, inquiring what companies were "on stock with us." The policy was on the stock of the plaintiff in its manufactory. The manual surrender by Wright of the policy in his possession was not, we think, necessary to effect its cancellation. His assent to the cancellation made by the agent was sufficient. It then ceased to be of any force, and was so treated by the parties. * * *

MARKEY v. MUTUAL BENEFIT INS. CO.

118 MASS. 178. — 1875.

GRAY, C. J. — The plaintiff undertook to prove a contract by the defendant to insure \$3,000 on the life of her husband, payable to her: 1st, by a policy executed by the defendant, and delivered by Wells as its agent to the plaintiff; 2d, by a contract to insure independently of any policy.

1. Upon the issue whether the policy was a contract binding the defendant, one question submitted to the jury was whether Wells "did deliver the policy to the plaintiff, intending to vest the property in her."

Upon this question the testimony introduced by the plaintiff did not substantially differ from that introduced at the former trial, and which this court, for reasons fully stated in 103 Mass. 78, which upon reconsideration we are satisfied with, and do not propose to recapitulate, held insufficient to warrant a jury in finding such intention.

It amounted to this and no more: That the husband being ill at home, Wells came to the house, bringing the policy with him, and passed it to the husband, saying he had brought him his policy; that the husband said he was glad of it, he had been expecting it for some days past; that he took the policy and read it over, and handed it to his wife, saying, "Eliza, there is your policy," and she took it and glanced it over, and laid it upon the table; that the husband told Wells "that he was not well enough to go out and get the money to pay for the policy, that he had made an arrangement with Mr. Banks over at the shop to get the money and pay it to him," and Wells said, "he would go over directly to Mr. Banks and get the money for the policy;" that, when Wells started to go out, the wife took the policy from the table and passed it to him, saying, "If you are going to Mr. Banks for the money you may need the policy; and may as well take it and leave it with him," and Wells took the policy; that her object in giving the policy to Wells was that she supposed he was going to Banks to get the money, and Banks would want to see the amount; and that upon her learning the next morning from Banks that the policy had not been delivered to him by Wells, the money was immediately sent to Boston for the policy.

The direction to leave the policy with Banks had no tendency to prove that the policy had been delivered; for it was equally consistent with the alternative that it was to be delivered to Banks, for the use of the plaintiff, upon his payment of the premium to Wells. The testimony of the plaintiff that, when she took the policy from her husband in the presence of Wells, she understood it was delivered to her to keep, whatever its legal competency and weight might be on the question of her own intention, had no tendency to prove the intention of Wells.

The testimony of Wells, upon the question whether he had authority to deliver policies without payment of the premium, added nothing to the evidence upon the question whether he actually intended to deliver this policy.

The whole evidence was in our opinion insufficient to warrant the jury in finding that the policy had been delivered so as to constitute a binding contract.

2. The plaintiff's own testimony, already stated, shows that the only form of contract of insurance, contemplated by the parties, was by a policy issued by the defendant upon the written application of the assured, and there is no evidence whatever that the defendant intended, or was understood by the assured or the plaintiff to intend, to make a contract of insurance in any other form. *Real Estate Ins. Co. v. Roessle*, 1 Gray, 336; *Sanborn v. Fireman's Ins. Co.*, 16 Gray, 448, 454; *Heyt v. Mutual Benefit Ins. Co.*, 98 Mass. 539; *Heiman v. Phoenix Ins. Co.*, 17 Minn. 153.

This point having been presented by the defendant in a distinct request for instruction at the trial, for the manifest purpose of reserving the question, and overruled by the presiding judge, is clearly open upon these exceptions. *Esty v. Wilmot*, 15 Gray, 168; *Markey v. Mutual Benefit Ins. Co.*, 103 Mass. 78, 87.

The jury having been erroneously instructed as to the sufficiency of the evidence upon each of the grounds upon which the plaintiff sought to recover, the defendant's

Exceptions must be sustained.

LIPMAN *v.* NIAGARA FIRE INS. CO.

121 N. Y. 454. — 1890.

THIS was an action upon an agreement of insurance evidenced by what is termed by insurance men a "binding slip," which was in these words:

"PELL, WALLACK & CO., INSURANCES, }
"55 LIBERTY STREET, NEW YORK, Sept. 2, 1885. }

"The undersigned do insure for account of Shaped Seamless Stocking Co. amounts as specified below at 1½ for 12 months from Sept. 2, 1885, on machinery and stock, building No. 3 (as per form, building situate Randall's Island, N. Y.) This receipt binding until policy is delivered at the office of Pell, Wallack & Co.

Company.	Amount.	Accepted by
Niagara.....	\$2,500.....	Pollock."

ANDREWS, J. — The binding slip signed by the defendant was not a mere agreement to insure, but was a present insurance to the amount specified therein. The instrument is informal. It states on whose account the insurance is made, the property covered, the amount insured, the term of the insurance and the date. But it

does not specify the risk insured against, nor does it contain any conditions such as are usually found in insurance policies. The evident design of the writing as disclosed by the testimony, was to provide temporary insurance pending an inquiry by the company as to the character of the risk, or, if that was known, during any delay in issuing the policy.

The secretary of the defendant signed the binding slip upon the solicitation of Pell, Wallack & Co., insurance brokers of the plaintiff, in the afternoon of September 2, 1885. The officers of the defendant having made inquiry as to the risk, notified the plaintiff's brokers before one o'clock of the afternoon of September 3d, that the defendant declined it. The property described in the binding slip was destroyed by fire in the afternoon of September 3d, the fire having commenced about three o'clock.

The claim on the one side is that the binding slip was a complete and perfect contract, binding the defendant according to its language, "until policy is delivered at the office of Pell, Wallack & Co.," and not terminable, therefore, by notice prior to that time, or, if so terminable, then only upon reasonable notice, which, as is claimed, was not given, nor in any event upon notice to the plaintiff's brokers, they not being agents of the plaintiff for the purpose of receiving such notice.

It is insisted on the other side that the contract evidenced by the binding slip was a contract subject to the conditions contained in the ordinary policy in use by the company, one of which contained the following clause:

"This insurance may be determined at any time by request of the assured, or by the company on giving notice to that effect to the assured, or to the person who may have procured this insurance to be taken by this company."

The notice given on the third of September prior to the fire terminated, as is insisted, the contract of insurance pursuant to this condition. We think there can be no doubt that the true construction of the binding slip only obligated the defendant according to the terms of the policy in ordinary use by the company. There is no other reasonable interpretation of the transaction. The binding slip was a short method of issuing a temporary policy for the convenience of all parties, to continue until the execution of the formal one. It would be unreasonable to suppose either that the brokers expected an insurance except upon the usual terms imposed by the company, or that the secretary of the company intended to insure upon any other terms. The right of an insurance company to terminate a risk is an important one. It is not reserved in terms

in the binding slip and could not be exercised at all so long as no policy should be issued, unless the condition in the policy is deemed to be incorporated therein.

Upon the plaintiff's contention the company could not cancel the risk so long as the binding slip was in force, and the only remedy of the company to get rid of the risk would be to issue the policy and then immediately cancel it. The binding slip was a mere memorandum to identify the parties to the contract, the subject-matter and the principal terms. It refers to the policy to be issued. The construction is, we think, the same as though it had expressed that the present insurance was under the terms of the usual policy of the company to be thereafter delivered.

The trial judge was of the opinion that the binding slip was not a complete and independent contract of insurance, subject to no conditions, but he ruled that the obligation of the defendant was to be determined by the question, whether the condition in the defendant's policy, that the company might terminate the policy by notice to the "person who procured the insurance," was a usual one, and submitted the case to the jury on that issue. The case of *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594, is, we think, a decisive authority against the view of the learned trial judge. The General Term dissented from the ruling of the trial judge on this point, and held that notice to Pell, Wallack & Co., the brokers who procured the insurance, was authorized by the condition in the policy. It, however, sustained the judgment on the ground that notice did not terminate the contract until a reasonable time had elapsed after it was given, and that the two and a half hours which intervened between the notice and the happening of the fire was not such reasonable time, and that consequently the insurance was then in force.

We think there can be no reasonable doubt upon the language of the condition that notice to the brokers was a good notice, and that if otherwise sufficient, it terminated the defendant's liability. The brokers procured the insurance. In fact their duties in respect to it had not been terminated. The binding slip provided that the policy, when issued, should be delivered at their office. The notice was given to persons to whom notice might be given by the express language of the policy. The special language of the condition in the defendant's policy upon this point was, it is said, inserted to meet the objections pointed out by this court in *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 415.

It remains to consider whether under the condition the policy terminated *eo instanti* on notice by the company. There is no language which postpones the effect of notice until the lapse of a rea-

sonable time thereafter. The rule is well settled that where a person undertakes to do an act upon notice from another, it is implied that he shall have a reasonable time after he is called upon to do the thing, or render the service, and no time for performance being specified, the law gives him a reasonable time. But where a contract fixes the time of performance, the rule of a reasonable time has no application. We have been referred to no case, nor have we found any, which sanctions the doctrine that where one has assumed an obligation which is to continue until notice given to the other party, the obligation continues after notice. If in this case the premium has been paid beyond the period when notice was given, then the bare notice would not have terminated the risk. But this for the reason that the company is bound in such case, in order to terminate the policy, not only to give notice, but to refund or offer to refund the insurance premium. This is the construction placed on clauses like the one in question. The cancellation in such case only takes place on notice and return of the premium for the unexpired term. *Van Valkenburgh v. Lenox Fire Ins. Co.*, 51 N. Y. 465; *Wood on Fire Ins.*, § 106.

The privilege reserved by the company to terminate the policy on notice, cannot be exercised under the circumstances which would make it operate as a fraud on the insured, as in case of notice given pending an approaching conflagration, threatening to destroy the property insured. *Home Ins. Co. v. Heck*, 65 Ill. 111.

In the present case no premium had been paid. The notice was given in good faith. There was no special emergency at the time. It was given during business hours, in ordinary course.

The contract provides that it should be terminated on notice. We perceive no reason why the contract should not be construed according to its terms. The parties might have provided that the risk should be carried by the company after notice for a reasonable time, to enable the insured to place it elsewhere. But they did not do so, and even if a custom of that kind had been proved, which was not, it would have been inadmissible to change or extend the explicit language of the contract. We think the cancellation was effected at the time of the service of the notice. *Mueller v. South Side Fire Ins. Co.*, 87 Penn. St. 399; *Grace v. Am. C. Ins. Co.*, 109 U. S. 278.

The judgment should, therefore, be reversed and a new trial granted.

All concur.

Judgment reversed.¹

¹"A 'binding slip' issued by an insurance company to insurance brokers, commencing with the word 'insure,' specifying certain property, giving the name of the owner, expressing a specified sum and a period of twelve months,

VI. REALITY OF CONSENT.

a. Concealment.

WALDEN v. LOUISIANA INS. CO.

12 LA. 134. — 1838.

MARTIN, J. — The plaintiff is appellant from a judgment, which rejected his claim for the value of a house, insured by the defendants, and which was destroyed by fire.

The facts of the case are these: A ropewalk, which was so contiguous to the house, that the destruction of the former by fire, must necessarily have involved the latter in the like calamity; it was rumored, that an attempt had been made to set fire to the ropewalk, which induced the plaintiff to insure the house. The defendants resisted his claim, on the ground, that he had not communicated the circumstance, which had excited his alarm and determined him to insure.

It appears to us, the District Court did not err. The underwriter had an undoubted right to be informed of every circumstance, which, creating or increasing the risk against which insurance is sought, may induce him to decline the insurance, or demand a higher premium. It appears, from the defendant's own confession, that the attempt which had been made, to set on fire a building, which could not have been consumed without materially endangering his house, created in him an alarm, which prompted him to guard against the danger.

It is true, he evidently acted in good faith; for when he called on the defendants for indemnification, he candidly informed them of the circumstance which had alarmed him. His ignorance of his duty cannot protect him against his omission to give information of a material fact, which the defendants had a right to know, in order to establish the proper rate of insurance.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

but adding 'this memo. to be void on delivery of the policy,' is not on its face such a perfect and complete contract of insurance as to preclude parol evidence of a usage between insurance brokers and insurance companies and of an actual intention of the parties that the slip should be binding only until action upon a pending application for renewal of a policy, and should not survive the rejection of the application and notice to that effect to the insured." — *Syllabus in Underwood v. Ins. Co.*, 161 N. Y. 413

BRONSON, J., IN BURRITT *v.* SARATOGA COUNTY
MUTUAL FIRE INS. CO.

5 HILL, (N. Y.) 188, 191. — 1843.

In marine insurance the misrepresentation or concealment by the assured of a fact material to the risk will avoid the policy, although no fraud was intended. It is no answer for the assured to say that the error or suppression was the result of mistake, accident, forgetfulness or inadvertence. It is enough that the insurer has been misled, and has thus been induced to enter into a contract which, upon correct and full information, he would either have declined, or would have made upon different terms. Although no fraud was intended by the assured, it is nevertheless a fraud upon the underwriter, and avoids the policy. *Bridges v. Hunter*, 1 Maule & Selw. 15; *Macdowall v. Fraser*, Doug. 260; *Fitzherbert v. Mather*, 1 T. R. 12; *Carter v. Boehm*, 3 Burr. 1905; *Bufe v. Turner*, 6 Taunt. 338; *Curry v. Commonwealth Ins. Co.*, 10 Pick. 535; *N. Y. Bowery Ins. Co. v. N. Y. Fire Ins. Co.*, 17 Wend. 359; 1 Marsh. Ins. (Condy), 451-453, 465; 1 Phil. Ins. 214, 303. The assured is bound, although no inquiry be made, to disclose every fact within his knowledge which is material to the risk. But this doctrine cannot be applicable, at least not in its full extent, to policies against fire. If a man is content to insure my house without taking the trouble to inquire of what materials it is constructed, how it is situated in reference to other buildings, or to what uses it is applied, he has no ground for complaint that the hazard proves to be greater than he had anticipated, unless I am chargeable with some misrepresentation concerning the nature or extent of the risk. It is, therefore, the practice of companies which insure against fire to make inquiries of the assured in some form, concerning all such matters as are deemed material to the risk, or which may affect the amount of premium to be paid. This is sometimes done by the conditions of insurance annexed to the policy, and sometimes by requiring the applicant to state particular facts in a written application for insurance. When thus called upon to speak, he is bound to make a true and full representation concerning all the matters brought to his notice, and any concealment will have the like effect as in the case of a marine risk. (See 1 Phil. Ins. 284, 285, ed of 1840.) It is not necessary for the purpose of avoiding the policy, to show that any fraud was intended. It is enough that information material to the risk was required and withheld.

This doctrine is fatal to the present action. The plaintiff was plainly and directly called upon to state the relative situation of the

store as to all other buildings within the distance of ten rods; and he omitted to mention several buildings which stood within that distance, and among the number was one which was far more hazardous than that to which the policy applied. If there could be any doubt that the facts concealed were material to the risk, the question should have been left to the jury.

PROUDFOOT v. MONTEFIORE.

L. R. 2 Q. B. 511. — 1867.

DECLARATION against the defendant as chairman of the Alliance Marine Assurance Company, claiming damages from the company in respect of the company not having delivered to the plaintiff a policy of insurance on certain goods shipped on board a ship called the *Anne Duncan*, pursuant to an agreement alleged by the plaintiff to have been entered into between the plaintiff and the company, and in respect of the company not having paid the sum of money which the plaintiff alleged would have become due on such policy if the same had been so delivered.

The plaintiff, in Liverpool, employed an agent at Smyrna to buy madder on his account, and to ship and consign the cargoes to him; the agent purchased and shipped a cargo of madder, and advised the plaintiff on the 12th of January, and sent the shipping documents on the 19th of January. The ship sailed on the 23d of January, but was stranded in the course of that day, and the cargo became a total loss. Intelligence of the loss was communicated to the agent on the 24th of January, and on the 26th, the next post day, he wrote to the plaintiff announcing the loss, but purposely abstained from telegraphing, in order that the plaintiff might not be prevented from insuring. The plaintiff, on the 31st of January, after the receipt of the letters of the 12th and 19th, but before the receipt of the letter of the 26th, and without any knowledge of the loss — which, however, had been telegraphed and posted in Lloyd's lists — effected an insurance:

COCKBURN, C. J., [*after stating the facts in the present case, and referring approvingly to Fitzherbert v. Mather, 1 T. R. 12, 16, and Gladstone v. King, 1 M. & S. 35, 38.*] An eminent authority, the late Mr. Justice Story, has, however, declined to be bound by these decisions. In a case, *Ruggles v. Ins. Co.*, 4 Mason, 74, tried before him on a policy of insurance effected after a total loss, where the master had omitted to give intelligence of the loss to his owner, with the fraudulent design of enabling him to make an insurance, and the insurance had been effected by the owner in ignorance of

the loss, that learned judge held that, as the owner at the time of procuring the insurance had no knowledge of the loss, but acted with an entire good faith, he was not precluded from recovering, and that the policy was not rendered void by the omission of the master to communicate intelligence of the loss, although such omission was wilful and fraudulent. The case being taken to a court of error, 12 Wheat. 408, the latter upheld the decision; not, indeed, on the grounds taken by Mr. Justice Story, but on the very unsatisfactory, and, as we think, untenable ground, that by the total loss of the vessel the master had wholly ceased to be the agent of the owner, and had become the agent of the underwriters. From the language of the judgment, it may be inferred that if the Court had considered that the relation of the master to his owners had not been interrupted by the loss of the vessel, they would not have upheld the decision appealed from. The ruling of Mr. Justice Story has been discussed by Mr. Duer, in his admirable work on insurance, vol. ii, p. 418; and we think the reasoning of the learned writer fully establishes his conclusion as to the ruling having been erroneous. Notwithstanding the dissent of so eminent a jurist as Mr. Justice Story, we are of the opinion that the cases of *Fitzherbert v. Mather*, and *Gladstone v. King*, were well decided; and that if an agent whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void, on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or, in the ordinary course of business, ought to have knowledge; and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject matter of insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact, which ought to have been made known to the underwriter and through such ignorance fails to disclose it.¹

¹ In *Blackburn v. Vigors*, 12 A. C. 531, it was held that a policy of marine insurance was not affected by the concealment of a material fact which was unknown to the assured and to the broker, though it had come previously to the knowledge of a different broker while formerly employed by the assured to effect another policy in respect of the same risk.

b. Representations and Warranties.

1. IN GENERAL.

PHOENIX LIFE INSURANCE CO. *v.* RADDIN.

120 U. S. 183. — 1887.

GRAY, J. — This was an action brought by Sewell Raddin, and prosecuted by his administrator, upon a policy of life insurance dated April 25, 1872, the material parts of which were as follows:

"This policy of assurance witnesseth that the Phoenix Mutual Life Insurance Company of Hartford, Conn., in consideration of the representations made to them in the application for this policy, and of the sum of one hundred and fifty-two dollars and ten cents to them duly paid by Sewell Raddin, father, and of the semi-annual payment of a like amount on or before the twenty-fifth day of April and October in every year during the continuance of this policy, do assure the life of Charles E. Raddin, of Lynn, in the county of Essex, State of Massachusetts, in the amount of \$10,000 for the term of his natural life. This policy is issued and accepted by the assured upon the following express conditions and agreements," namely, among others, that "if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, this policy shall be null and void." The application was signed by Sewell Raddin, both for his son and for himself, and contained twenty-nine printed "questions to be answered by the person whose life is proposed to be insured, and which form the basis of the contract," three of which, with the written answers to them, and the concluding paragraph of the application, were as follows:

"(10) Is the party addicted to the habitual use of spirituous liquors or opium? No.

"(25) Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the No. of policy?

\$10,000, Equitable Life Assurance Society.

"(29) Is the party and the applicant aware that any untrue or fraudulent answers to the above queries, or any suppression of facts in regard to the health, habits, or circumstances of the party to be assured, will vitiate the policy, and forfeit all payments thereon? Yes.

"It is hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that this application shall form the basis of the contract for insurance, which contract shall be completed only by delivery of policy, and that any untrue, or fraudulent answers, any suppression of facts, or should the applicant become as to habits, so far different from condition now represented to be in as to make the risk more than ordinarily hazardous, or neglect to pay the premium on or before the day it becomes due, shall and will render the policy null and void, and forfeit all payments made thereon."

It was admitted at the trial that all premiums were paid as they fell due; that Charles E. Raddin died July 18, 1881; and that at the date of this policy he had an endowment policy in the Equitable Life Assurance Society for \$10,000, which was afterwards paid to him.

One of the defenses relied on at the trial was that the answer to question 28 in the application was untrue, and that there was a fraudulent suppression of facts material to the insurance, because the plaintiff, by his answer to that question, "\$10,000, Equitable Life Assurance Society," intended to have the defendant understand that the only application which had been made to any other company for assurance upon the life of his son was one made to the Equitable Life Assurance Society, upon which that society had issued a policy of \$10,000; whereas in fact the plaintiff, within three weeks before the application for the policy in suit, had made applications to that society, and to the New York Life Insurance Company, for additional insurance upon the son's life, each of which had been declined. The defendant offered to prove that the two other applications were made and declined as alleged, and that the facts as to the making and the rejection of both those applications were known to the plaintiff, and intentionally concealed by him, at the time of his application to the defendant; and upon these offers of proof asked the court to rule — First, that the answer to question 28 was untrue, and, therefore, no recovery could be had on this policy; second, that there was a suppression of facts by the plaintiff, and therefore, he could not recover; and, third, "that the answer to question 28 must be construed to be an answer to all the clauses of that question, and as such was misleading, and amounted to a concealment of facts which the defendant was entitled to know, and the plaintiff was bound to communicate." But the court excluded all the evidence so offered, declined to give any of the rulings asked for, and ruled "that, if the answer to one of the interrogatories of question 28 was true, there would be no breach of the warranty; that the failure to answer the other interrogatories of question 28 was no breach of the contract; and that, if the company

took the defective application, it would be a waiver on their part of the answers to the other interrogatories of that question." The jury having returned a verdict for the plaintiff in the full amount of the policy, the defendant's exceptions to the refusal to rule as requested, and to the rulings aforesaid, present the principal question in the case.

The rules of law which govern the decision of this question are well settled, and the only difficulty is in applying those rules to the facts before us. Answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant. *Moulton v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. 466; *Campbell v. Insurance Co.*, 98 Mass. 381; *Thompson v. Weems*, 9 App. Cas. 671.

The misrepresentation or concealment by the assured of any material fact entitles the insurers to avoid the policy. But the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract. *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495; *Jeffries v. Life Ins. Co.*, 22 Wall. 47; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Macdonald v. Insurance Co.*, L. R. 9 Q. B. 328; *Edlington v. Insurance Co.*, 77 N. Y. 564, and 100 N. Y. 536, 3 N. E. 315.

Where an answer of the applicant to a direct question of the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application. *Cazenove v. Assurance Co.*, 29 Law J. N. S. (C. P.) 160, affirming s. c., 6 C. B. (N. S.) 437. But where upon the face of the application, a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial. *Conn. Insurance Co. v. Luchs*, 108 U. S. 498, 2 Sup. Ct. 949; *Hall v. People's Ins. Co.*, 6 Gray, 185; *Lorillard Ins. Co. v. McCulloch*, 21 Ohio St. 176; *American Insurance Co. v. Mahone*, 56 Miss. 180; *Carson v. Insurance Co.*, 43 N. J. Law, 300, 44 N. J. Law, 210; *Lebanon Ins. Co. v. Kepler*, 106 Pa. St. 28.

The distinction between an answer apparently complete, but in

fact incomplete, and therefore, untrue, and an answer manifestly incomplete, and as such accepted by the insurers, may be illustrated by two cases of fire insurance, which are governed by the same rules in this respect as cases of life insurance. If one applying for insurance upon a building against fire is asked whether the property is incumbered, and for what amount, and in his answer discloses one mortgage, when in fact there are two, the policy issued thereon is avoided. *Towne v. Insurance Co.*, 7 Allen, 51. But if to the same question he merely answers that the property is incumbered without stating the amount of incumbrances, the issue of the policy without further inquiry is a waiver of the omission to state the amount. *Nichols v. Insurance Co.*, 1 Allen, 63.

In the contract before us the answers in the application are nowhere called warranties, or made part of the contract. In the policy those answers and the concluding paragraph of the application are referred to only as "the declarations or statements upon the faith of which this policy is issued;" and in the concluding paragraph of the application the answers are declared to be "fair and true answers to the foregoing questions," and to "form the basis of the contract for insurance." They must, therefore, be considered, not as warranties which are part of the contract, but as representations collateral to the contract, and on which it is based.

The twenty-eighth printed question in the application consists of four successive interrogatories, as follows: "Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the No. of policy." The only answer written opposite the question is "\$10,000, Equitable Life Assurance Society." The question being printed in very small type, the answer is written in a single line midway of the opposite space, evidently in order to prevent the ends of the letters from extending above or below that space; and its position with regard to that space, and to the several interrogatories combined in the question, does not appear to us to have any bearing upon the construction and effect of the answer. But the four interrogatories grouped together in one question, and all relating to the subject of other insurance, would naturally be understood as all tending to one object, — the ascertaining of the amount of such insurance. The answer in its form is responsive, not to the first and second interrogatories, but to the third interrogatory only, and fully and truly answers that interrogatory by stating the existing amount of prior insurance, and in what company, and thus renders the fourth interrogatory irrelevant. If

the insurers, after being thus truly and fully informed of the amount and the place of prior insurance, considered it material to know whether any unsuccessful applications had been made for additional insurance, they should either have repeated the first two interrogatories or have put further questions. The legal effect of issuing a policy upon the answer as it stood was to waive their right of requiring further answers as to the particulars mentioned in the twenty-eighth question, to determine that it was immaterial, for the purposes of their contract, whether any unsuccessful applications had been made, and to estop them to set up the omission to disclose such applications as a ground for avoiding the policy. The insurers, having thus conclusively elected to treat that omission as immaterial, could not afterwards make it material by proving that it was intentional.

The case of *London Assurance v. Mansel*, 11 Ch. Div. 363, on which the insurers relied at the argument, did not arise on a question including several interrogatories as to whether another application had been made, and with what result, and the amount of existing insurance, and in what company. But the application or proposal contained two separate questions — the first whether a proposal had been made at any other office, and, if so, where; the second whether it was accepted at the ordinary premium, or at an increased premium, or declined; and contained no third question or interrogatory as to the amount of existing insurance, and in what company. The single answer to both questions was, "Insured now in two offices for \$16,000, at ordinary rates. Policies effected last year." There being no specific interrogatory as to the amount of existing insurance, that answer could apply only to the question whether a proposal had been made, or to the question whether it had been accepted, and at what rates, or declined; and as applied to either of those questions it was in fact, but not upon its face, incomplete, and, therefore, untrue. As applied to the first question, it disclosed only some, and not all, of the proposals which had in fact been made; and, as applied to the second question, it disclosed only the proposals which had been accepted, and not those which had been declined, though the question distinctly embraced both. That case is thus clearly distinguished in its facts from the case at bar. So much of the remarks of Sir George Jessel, M. R., in delivering judgment, as implies that an insurance company is not bound to look with the greatest attention at the answers of an applicant to the great number of questions framed by the company or its agents, and that the intentional omission of the insured to answer a question put to him is a concealment which will avoid a policy issued without

further inquiry, can hardly be reconciled with the uniform current of American decisions. For these reasons, our conclusion upon this branch of the case is that there was no error of which the company had a right to complain, either in the refusals to rule, or in the rulings made. * * *

DAY, C. J., IN *MILLER v. MUTUAL BENEFIT LIFE INS. CO.*

31 IA. 216, 226. — 1871.

THE court gave the following instruction, to wit: "The language of the policy does not make the statements contained in the application for it matters of warranty, but matters of representation." The defendant excepted to this instruction and assigns the giving of it as error.

A warranty differs from a representation in two essential aspects. First, a warranty constitutes a part of the contract, and it is necessary that it should be exactly and literally complied with; but a representation is collateral to the contract, and it is sufficient if it be equitable and substantially complied with. Second, in a case of a warranty the burden of proof is upon the party seeking indemnity to establish a case in all respects in conformity with the terms under which the risk was assumed; but in case of a representation the burden is cast upon the defendant to set forth and prove the collateral facts upon which he relies: 1 Phillips on Insurance, §§ 669, 754, and *Campbell v. New England Mutual Life Insurance Co.*, 98 Mass 389, 390. In the case of *Daniels v. Hudson River Fire Insurance Co.*, 12 Cush. 416, Shaw, C. J., very clearly and forcibly illustrated the distinction between a warranty and a representation. He said: "The difference" (between a warranty and a representation) "is most essential. If any statement of fact, however unimportant it may have been regarded by both parties to the contract is a warranty, and it happens to be untrue, it avoids the policy. If it be construed as a representation and is untrue, it does not avoid the contract if not willful or if not material. To illustrate this, the application in answer to an interrogatory is this: 'ashes are taken up and removed in iron hods,' whereas it should turn out in evidence that ashes were taken up and removed in copper hods, perhaps a set recently purchased and unknown to the owner. If this was a warranty, the policy is gone; but if a representation, it would not, we presume, affect the policy, because not willful or designed to deceive, but more especially because it would be utterly immaterial, and would not have influenced the mind of either party in making the contract or in fixing its terms." In the case of *Camp-*

bell v. New England Mutual Life Insurance Co., it was said, that "when statements or engagements on the part of the insured are inserted, or referred to in the policy itself, it often becomes difficult to determine to which class they belong. If they appear on the face of the policy they do not necessarily become warranties. Their character will depend upon the form of expression used, the apparent purpose of the insertion, and sometimes upon the connection or relation to other parts of the instrument. If they are contained in a separate paper, referred to in such a manner as to make it a part of the contract, the same considerations, of course, will apply. * * * In considering the question whether a statement forming a part of the contract is a warranty, it must be borne in mind, as an established maxim, that warranties are not to be created nor extended by construction. They must arise, if at all, from the fair interpretation and clear intendment of the words used by the parties." Citing *Daniels v. Hudson River Ins. Co.*, 12 Cush. 416, 424; *Blood v. Howard Ins. Co.*, 12 Id. 472; *Jefferson Ins. Co. v. Cothel*, 7 Wend. 72; *Forbush v. Western Mass. Ins. Co.*, 4 Gray, 337, 340.

"The application is in itself collateral merely to the contract of insurance. Its statements, whether of facts or agreements, belong to the class of *representations*. They are to be so construed, unless converted into warranties by force of a reference to them in the policy, and a clear purpose manifest in the papers thus connected, that the whole shall form one entire contract. When the reference to the application is expressed to be for another purpose, or when no purpose is indicated to make it part of the policy, it will not be so treated." *Campbell v. New England Mutual Life Ins. Co.*, 98 Mass. 391, 392; *Snyder v. Farmers' Ins. and Loan Co.*, 13 Wend. 92.

In the case of *Daniels v. Hudson River Fire Ins. Co.*, Shaw, C. J., having alluded to the fact that a warranty, however immaterial, if untrue, avoids the policy, uses this language: "Hence it is, we suppose, that the leaning of all courts is to hold such a stipulation to be a representation rather than a warranty in all cases where there is any room for construction, because such construction will, in general, best carry into effect the real intent and purpose which the parties have in view in making their contract." And the learned Chief Justice, in the same case, further said: "If by any words of reference the stipulations in another instrument, such as the proposal or application, can be construed a warranty, it must be such as makes it in legal effect a part of the policy."

In the case of *Campbell v. New England Mutual Life Ins. Co.*, the defendant insisted, as in the present case, that certain statements were to be regarded as warranties, and the point decided in the case

is so pertinent to the present inquiry, and the reasoning is so clear and forcible that we feel justified in quoting further from it. The court said: "In every case cited in support of the defendant's position, there was an express reference in the policy which made the application a part of the contract. The one most relied on, and claimed to be especially applicable to the facts of the present case, is that of *Miles v. Connecticut Ins. Co.*, 3 Gray, 580. In that case it was declared in the policy itself to be 'expressly understood and agreed to be the true intent and meaning hereof, that if the proposal, answer, and declaration made by the assured, and upon the faith of which this agreement is made, shall be found in any respect untrue, then and in such case this policy shall be null and void.' In that proposal the assured declare (among other things) that the answers and statements therein made are correct and true, and 'agreed that the answers given to the following questions and the accompanying statements, and this declaration, shall be the basis, and form part of the contract or policy between them and the said company.' Two marked features in that case distinguish it from the present. First, the clause in the policy relates distinctly and exclusively to the paper called 'the proposal and declaration.' Second, when the two papers are thus brought together there is a distinct agreement not only that the statements are true and correct, but that they are to form a part of the contract. In the present case the policy contains no reference to any application, nor to any declaration or statement in writing, made or to be made by the assured. The only clause in the policy which can have any bearing upon the question, when disconnected from other provisions of a diverse character, reads as follows, namely: 'Or if the statements made by or on behalf of, or with the knowledge of, the said assured to the company, as the basis of, or in the negotiation for, this contract shall be found in any respect untrue, then, and in each of said cases, this policy shall be null and void.' It is clear that this is not a reference to any particular instrument or paper, but it includes any and all statements, whether oral or written. The defendant, however, contends that a written application having been made in this case, which by its own terms declares the statements therein contained to be made 'as the basis of' the insurance applied for, the policy will attach to that application as containing the statements referred to, and thus constitute an express warranty. We are far from being ready to concede that the reference is sufficiently definite to warrant the bringing of the two papers together for the purpose of giving a construction to the contract. But, even if the application may properly be resorted to for aid in

the construction, it contains no agreement and no words to indicate that its statements are to be taken as warranties, nor that they are to form part of the contract."

In the case at bar the proceedings with reference to the procuring of the policy comprise five papers. The one designated "A" is headed, "Particulars required from persons proposing to effect assurance on lives in this company." That designated "B" is headed, "Questions to be answered by the physician of the party applying for insurance." That designated "C" is headed, "Questions to be answered by the friend of the party applying for assurance." That designated "D" is headed, "Questions to be answered by the agent, if the applicant is not previously known to him." And the fifth is designated as follows: "Declaration to be made and signed by the person proposing to make an assurance on the life of another." This last-mentioned paper is the one which appears first in the statement of facts, and is signed, "Mary L. Miller, by James A. Miller." To this reference is made in the policy as follows: "And it is also understood and agreed by the within assured to be the true intent and meaning hereof that if the declaration made by or for the assured, and bearing date the 19th day of February, 1866, and upon the faith of which this agreement is made, shall be found in any respect untrue, then and in such case this policy shall be null and void."

It is worthy of note that the *declaration* is referred to by name, and that to none of the other papers, each of which has a specific designation in the proceedings, is any reference made in the policy. In this respect it differs from the case of *Miles v. The Connecticut Insurance Co.*, before alluded to, in which the policy made direct reference to the *proposal*, *answer*, and *declaration* made by the assured, and provided that if they were found in any respect untrue, the policy should be null and void.

Applying the principles of the foregoing decisions to the present case it follows that the statements contained in the *declaration* can alone be regarded as warranties, and that the answers of Miller to the *questions* propounded to him are mere representations.

If the instruction of the Court had reference to the answers to the printed interrogatories, it was proper. If it had reference to the *declaration*, it was not error to the prejudice of appellant. The only alleged misstatement, of which complaint is made, is contained in the answer of Miller to the questions asked him. Hence it becomes quite immaterial what construction is placed upon the statements in the declaration. As the Court did not err in giving the foregoing instruction, it follows that the fourth instruction

asked by the defendant, embodying a doctrine at variance with it, was properly refused.

In the case of *Henry Wilkinson v. The Connecticut Mutual Life Ins. Co.*, decided at the December Term, 1870, it was said that, under the terms of the policy in that case, the answers to the questions contained in the application became warranties. That action was against the same company in which the decision of *Miles v. The Connecticut Ins. Co.*, 3 Gray, 580, was rendered, the policies of which, as we have seen, contain provisions differing widely from those now under consideration.

III. The Court further instructed the jury as follows: "It is for you to determine the materiality of the alleged misstatements, if any have been proven." This instruction we consider erroneous. The only misstatements complained of are the answers of Miller to the following questions, to wit: "Is the party sober and temperate?" "Has he always been so?" A misrepresentation by one party of a fact specifically inquired about by the other, though not material, will have the same effect in exonerating the latter from the contract as if the fact had been material, since, by making such inquiry, he implies that he considers it so. In all jurisprudence this distinction is recognized. It is particularly applicable to written answers to written inquiries, referred to in a policy. The rule is so because a party, in making a contract, has a right to the advantage of his own judgment of what is material, and if, by making specific inquiry, he implies that he considers a fact to be so, the other party is bound by it as such. 1 Phil. on Ins. § 342, and cases cited; also, *Campbell v. New England Mutual Life Insurance Co.*, 98 Mass. 401. Representations of this kind differ from warranties in that a substantial compliance with them is sufficient to answer their terms. Whether there has been such substantial compliance — that is, whether the representation is in every material respect true, is a question of fact for the jury. But it is not for the jury to say that the representation, though substantially untrue, is, notwithstanding, immaterial. An illustration will make plain the view of the Court. Suppose that in answer to a specific question the assured states that his age is thirty years. It appears from the evidence that his age is a week or a month greater. The question would be a proper one for the jury to say whether the representation, though strictly and technically untrue, was not substantially and materially true. But suppose it appears from the evidence that the age of the assured is fifty instead of thirty years. It is not the province of the jury to say that the representation, though untrue, is immaterial. As is well said in the case of *Campbell v. New England Mutual Life Insu*

ance Co., it is not within the province of the jury, under the guise of determining whether the statements of the applicant were materially false or untrue in some particulars material to the risk, to find that diseases and infirmities were not material to be disclosed, which the parties had, by the form of the contract of insurance, and of the contemporaneous written application, conclusively agreed to consider material. See, also, *Davenport v. New England Insurance Co.*, 6 Cush. 341. We are aware that there are authorities which sustain the instruction of the Court, but they seem not to have noticed the distinction here recognized, and are not, in our judgment, so much in accord with sound legal principles as those which support the converse doctrine. * * *

2. PROMISSORY REPRESENTATIONS.

GRAY, J., IN *KIMBALL v. ÆTNA INSURANCE CO.*

9 ALLEN, 540, 541. — 1865.

THE contract of insurance is a contract to indemnify the owner of certain property against certain risks. This contract is founded upon the representations previously made by the assured to the insurer. The condition and circumstances of the property are within the knowledge of the owner more than of the insurer, and must be truly represented by the former to the latter, in order that he may estimate the risk before entering into the contract. In making this representation, the utmost good faith is required. If an existing fact material to the risk is misrepresented by the owner to the underwriter, the minds of the parties never meet, they agree on no subject-matter to which the contract can attach, the contract

¹ It is, however, generally true, that where the application is expressly declared to be a part of the policy, and the statements therein contained are warranted to be true, as was the case here, such statements will be deemed material whether they are so or not and if shown to be false, there can be no recovery on the policy, however innocently made, and notwithstanding their falsity may have no agency in causing the loss or producing the death of the assured. *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136; *O'Neil v. Buffalo Fire Ins. Co.*, 3 Id. 122; *Bartau v. Phoenix Mutual Life Ins. Co.*, 67 Id. 595. While this is true as a general rule, still there are cases to be found in which the statements in the application have been held to be representations, merely, notwithstanding they were expressly declared to be warranties, as they are here." [Citing *Fitch v. Ins. Co.*, 50 N. Y. 557.] — *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474, 482. See also *Kettenbach v. Assoc.*, 49 Neb. 842 (reported herein at p. 252), where statements stipulated in the policy to be "warranties" were held to be representations.

founded on such misrepresentation never takes effect, the underwriter may treat it as a nullity, and the other party, unless chargeable with fraud, may recover back the premium. If representations, whether oral or written, concerning facts existing when the policy is signed, are false, it never has any existence as a contract, unless it contains in itself terms which expressly or by necessary implication waive or supersede the previous representations. If the representations are positive and not of mere opinion or belief, it matters not whether they are made at or before the time of the execution of the policy, nor whether they are expressed in the present or the future tense, if they relate to what the state of facts is or will be when the policy is executed and the risk of the underwriter begins. If the facts are then materially different from the representations, the whole foundation of the contract fails, the risk does not attach, the policy never becomes a contract between the parties. Representations of facts existing at the time of the execution of the policy need not be inserted in it; for they are not necessary parts of it, but, as is sometimes said, collateral to it. They are its foundation, and if the foundation does not exist, the superstructure does not arise. Falsehood in such representations is not shown to vary or add to the contract, or to terminate a contract which has once been made; but to show that no contract has ever existed.

The word "representations" has not always been confined in use to representations of facts existing at the time of making the policy; but has been sometimes extended to statements made by the assured concerning what is to happen during the term of the insurance;¹ in other words, not to the present, but to the future; not to facts which any human being knows or can know, but to matters of expectation or belief, or of promise and contract. Such statements (when not expressed in the form of a distinct and explicit warranty which must be strictly complied with) are sometimes called "promissory representations," to distinguish them from those relating to facts, or "affirmative representations." And these words express the distinction; the one is an affirmation of a fact existing when the contract begins; the other is a promise to be performed after the contract has come into existence. Falsehood in the affirmation prevents the contract from ever having any life; breach of the promise could only bring it to a premature end. A promissory representation may be inserted in the policy itself; or it may be in

¹ In the present case, plaintiff had procured the policies upon the representation that the house *would be* occupied.

the form of a written application for insurance, referred to in the policy in such a manner as to make it in law a part thereof; and in either case the whole instrument must be construed together. But this written instrument is the expression, and the only evidence, of the duties, obligations, and promises to be performed by each party while the insurance continues. To make the continuance or termination of a written contract, which has once taken effect, dependent on the performance or breach of an earlier oral agreement, would be to violate a fundamental rule of evidence. A representation that a fact now exists may be either oral or written; for if it does not exist, there is nothing to which the contract can apply. But an oral representation as to a future fact, honestly made, can have no effect; for if it is a mere statement of an expectation, subsequent disappointment will not prove that it was untrue; and if it is a promise that a certain state of facts shall exist or continue during the term of the policy, it ought to be embodied in the written contract.¹

3. STATUTORY ENACTMENTS AS TO REPRESENTATIONS AND WARRANTIES.

TAFT, J., IN PENN MUTUAL LIFE INSURANCE CO. *v.* MECHANICS' SAVINGS BANK.

37 U. S. APP. 692, 703, (72 FED. 413, 418). — 1896.

THERE can be no doubt that this policy is to be construed according to the law of Pennsylvania. It is expressly provided in the application, which is made part of the policy, that "the place of contract shall be the city of Philadelphia, State of Pennsylvania."

¹ In *Benham v. Assurance Co.*, 7 Exch. 744, a case of guaranty insurance, the written application, which was referred to in the policy as being the basis for the contract, contained the following question: State "the checks which will be used to secure accuracy in his accounts, and when and how often they will be balanced and closed?" The answer was: "Examined by finance committee every fortnight." The opinion of POLLOCK, C. B., was as follows: "The manner in which this question is put, the other questions with which it is associated, and the decisions upon policies of insurance, lead me to the conclusion that the answer was not expected to be upon the part of the office, or meant to be on the part of the plaintiff, anything more than a declaration of the course intended to be pursued; and if that answer was made *bona fide* and honestly, it does not prevent the plaintiff from maintaining this action." The other Barons concurred.

For a discussion and criticism of the view that a distinction is to be made between affirmative and promissory representations, see Biddle on Insurance, §§ 533-535.

In *Wayman v. Southard*, 10 Wheat. 1, 48, Chief Justice Marshall stated it to be a principle of universal law that "in every forum a contract is governed by the law with a view to which it is made." See *Pritchard v. Norton*, 106 U. S. 124, 136, 1 Sup. Ct. 102, and cases there cited. In this case no necessity exists for presumption from the circumstances, because the intention of the parties is express.

An act of the Legislature of Pennsylvania, passed June 23, 1885, provides that:

"Whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application unless such misrepresentation or untrue statement relate to some matter material to the risk." Laws of 1885, p. 134, No. 101.

At common law it is held that the warranty of the truth of the answer to a specific inquiry in the application implies the agreement that the subject-matter of the question and answer is to be regarded as material, and that an untrue answer thus warranted avoids the policy, whether the answer be made in good faith or not. *Anderson v. Fitzgerald*, 4 H. L. Cas. 484. It is contended by counsel for the insurance company that the same mode of determining the materiality of representations must obtain under this statute. If so, then it is difficult to see what change the statute was intended to effect, because every matter warranted would be material, and the good faith in the statement would remain of as little importance as it did without the statute. This is one of a class of statutes passed in many States to relieve against the hardships arising from the strict enforcement at common law of warranties in insurance policies concerning matters having no real or proximate relation to the risk assumed by the insurer. By the aid of such warranties, and the innocent mistakes of the insured, it often happened that the insurer was able to escape liability on a ground having no real merit, and of the purest technicality. That such statutes are remedial in their nature, and are quite within the police power of the Legislature, is no longer a debatable question. *White v. Insurance Co.*, 4 Dill. 177, Fed. Cas. No. 17,545; *Society v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822; *Wall v. Assurance Soc.*, 32 Fed. 273; *Eagle Ins. Co. of Cincinnati v. State*, 153 U. S. 446, 14 Sup. Ct. 868; *Reilly v. Insurance Co.*, 43 Wis. 449; *Insurance Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072; 4 Thomp. Corp. §§ 5491, 5524. As the statute was passed to prevent defeat of the policy by mere stringency of stipulation, a rea-

sonable interpretation of it will not permit the mere fact of warranty in form to render every statement of fact material to the risk. Its manifest purpose was to leave open to judicial investigation in the ordinary way the question whether the fact concerning which inquiry was made, and an untrue answer given, was material to the risk. If it is in this manner found to be material, then the plain implication of the statute is that the usual penalty for breach of insurance condition and warranty shall follow, and the policy be avoided, whether the answer be made in good faith or not. If, however, the question untruly answered relates to something not found to be material to the risk, and if the answer is in good faith, then the breach of warranty works no prejudice to the insured or his representatives. If, though the question untruly answered relates to something not directly material to the risk, the untrue answer is made in bad faith — that is, with a knowledge of its falsity, and for the purpose of misleading the company into the contract — the implication of the statute is that the rule at common law shall prevail, and the policy shall be avoided. The statute has been construed by the Supreme Court of Pennsylvania, and we think our conclusions above stated are in accordance with the views of that court. *Hermany v. Association*, 151 Pa. St. 17, 24 Atl. 1064. In that case the court say (page 23), 151 Pa. St., and page 1064, 24 Atl.:

“ This act has effected a change in life insurance contracts — a much-needed change so far as some companies are concerned. The questions of materiality and good faith are ordinarily questions of fact, and, therefore, for the jury. They were certainly so in this case. * * * The evident purpose of this legislation was to strike down, in this class of cases, literal warranties, so far as they may be resorted to for the disreputable purpose of enforcing actually immaterial matters. It provides a rule of construction for the purpose of preventing injustice, and it is as much the duty of courts to enforce such rules as it is to administer the statute of frauds and perjuries.”

The construction of a State statute by the highest court of the State is usually authoritative in courts of the United States. *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10. And, even if it were otherwise, we should reach the same conclusion in this case. The Court of Appeals of Maryland has had occasion to construe this same statute, and has given it a like interpretation. *Association v. Ficklin*, 74 Md. 172, 21 Atl. 680, and 23 Atl. 197. * * *

¹ Some other States have similar statutes. See especially the discussion of the Massachusetts statute in *White v. Soc.*, 163 Mass. 108.

4. EFFECT OF MISREPRESENTATION.

WALLER *v.* THE NORTHERN ASSURANCE CO.

64 LA. 101. — 1884.

THESE are actions at law to recover for money paid as premiums upon certain policies of insurance successively issued to plaintiff, the last one being held void, in an action thereon to recover for a loss, on the ground that the assured held but a mortgage interest in the property insured, while the policy was issued to him as the absolute owner.

BECK, J. * * * II. A condition of the policy provides that, "if the interest of the assured in the property be any other than entire, unconditional and sole ownership of the property, for the use and benefit of the assured, * * * it must be so represented to these companies, and so expressed in the written part of this policy, otherwise the policy shall be void." Under this condition, each of the policies was absolutely void, and incapable of binding or being enforced against defendants. And, in an action upon the one last issued, its invalidity was pleaded by defendants and adjudicated by the court. As the other policies in no respect differ as to their conditions, or the facts pertaining to each contract, upon which its validity depends, each is in fact invalid by law, and defendants cannot now be heard to deny its invalidity. We can discover no ground upon which to base a distinction as to the rights of plaintiff under the several policies and growing out of the several transactions. Each presents the case of a payment of money by plaintiff, and a failure to receive any consideration therefor, without any fraud or deception practiced by him. It is a simple case of money paid in good faith, and nothing in return received. No element of fraud exists which defeats plaintiff's rights. Nor is it a case of voluntary payment, for it was made with the expectation of receiving a consideration in return, which has wholly failed, for the reason that the policy did not bind defendants. Under familiar rules of law, plaintiff is entitled to recover the amount of the premiums paid as money had and received to his use. This doctrine has often been recognized by the authorities as applicable in actions for the recovery of money paid as premiums upon policies when the risk did not attach, or the contract was void *ab initio*. * * *¹

¹See also the first paragraph of *Kimball v. Ins. Co.* as given *ante*, p. 118.

5. BURDEN OF PROOF.

MITCHELL, J., IN CHAMBERS *v.* NORTHWESTERN MUTUAL LIFE INS. CO.

64 MINN. 495, 497. — 1896.

2. THE next question is, was the burden on the plaintiff to allege and prove the truth of the answers to the questions contained in the application, or was it upon the defendant to allege and prove their falsity? Defendant's contention is, that because, if any of these answers were false, the policy would be void *ab initio*, therefore they were conditions precedent, and hence, according to a familiar rule, the burden was on the plaintiff to allege and prove that they were true. The law is so well settled otherwise that it would hardly seem to require discussion.

For the purposes of this case it is immaterial whether these answers are to be deemed warranties or mere representations, for the rule of pleading and proof would be the same in either case. Hence we shall assume, most favorably to the defendant, that the answers are warranties. A condition precedent, as known in the law, is one which is to be performed before the agreement of the parties becomes operative. A condition precedent calls for the performance of some act or the happening of some event after the contract is entered into, and upon the performance or happening of which its obligation is made to depend. In the case of a mere warranty, the contract takes effect and becomes operative immediately. It is true that, where a policy of insurance so provides, if there is a breach of a warranty, the policy is void *ab initio*. But this does not change the warranty into a condition precedent, as understood in the law. It lacks the essential element of a condition precedent, in that it contains no stipulation that an event shall happen or an act shall be performed in the future, before the policy shall become effectual. It is more in the nature of a defeasance, where the insured contracts that, if the representations made by him are not true, the policy shall be defeated and avoided. But, even if these warranties are to be deemed conditions precedent, it has become settled in insurance law, for practical reasons, that the burden is on the insurer to plead and prove the breach of the warranties.

Not only so, but he must, in his pleading, single out the answers whose truth he proposes to contest, and show the facts on which his contention is founded. Otherwise, the insured would enter the trial ignorant as to which of his numerous answers would be assailed as false. The number of questions in these applications is usually

very great, relating to the habits and health of ancestors, the personal habits and condition of the applicant, etc., the truth of many of which it would be impossible to prove affirmatively after the death of the insured. To require such proof on part of the beneficiary would defeat more than half of the life policies ever issued. On the other hand, it is no hardship to require of the insurer, if he believes that any of these answers were false, that he specifically allege which ones he claims to be false, and produce evidence of the truth of his claim. It would be superfluous to cite authorities on this subject; but to the point that these warranties are not conditions precedent, in the legal sense of the term, we refer to *Redman v. Insurance Co.*, 49 Wis. 431, 4 N. W. 591; and, for a forcible statement of the practical reasons for the rule, to *Insurance Co. v. Ewing*, 92 U. S. 377. The dictum in *Price v. Insurance Co.*, 17 Minn. 497 (Gil. 473), that warranties are conditions precedent, the truth of which must be pleaded and proved by the assured, was, we think, inadvertent, and cannot be adhered to. We, therefore, hold that it was no part of plaintiff's case to either allege or prove the truth of the answers in the application, that the burden of alleging and proving their falsity was on the defendant, that it was bound to specify in its defense the particular answers which it claimed were false, and that on the trial it was properly limited in its proof to those answers which it had specifically alleged to be false.¹

¹ "The policy with the conditions annexed constitute an entire contract, and in declaring upon the contract, it, or a sufficient portion of it to show a right of recovery, must be set out either in terms or in substance. This is not like suing on a penal bond at common law, where the plaintiff might simply count on the bond and leave the defendant to set up the condition and plead performance. But in a case of this character, the money only being payable upon the assured performing certain acts, all such precedent acts should be set out and their performance averred. But all conditions subsequent to the right of recovery, and all acts to be done by the company in discharge of their liability, may be omitted and left to be set up as a defense."—*Rockford Ins. Co. v. Nelson*, 65 Ill. 415, 418.

"The position of the appellant, that the plaintiff was bound, in the first instance, to prove that he did not keep or use more than the specified quantity of benzine, is not tenable. In an action on a policy of insurance, the allegation in the complaint, under section 533 of the Code of Civil Procedure, that the plaintiff has duly performed all the conditions of the contract on his part, does not require him to prove, as a part of his affirmative case, that he has not committed any of the acts which the policy prohibits. Proof to this effect need not be offered by him until some evidence of a violation of the prohibition has been given by the defense. *Hunt v. Hudson River Fire Ins. Co.*, 2 Duer, 481, 489; *Fischer v. Metropolitan Life Ins. Co.*, 37 App. Div. 575, 582; *Bennett v. Maryland Fire Ins. Co.*, 14 Blatchf. 422; and see *Blasingame v. Home Ins. Co.*, 75 Cal. 633."—*Rau v. Ins. Co.*, 50 App. D. (N. Y.) 428. See the comprehensive article upon "Declarations on Insurance Policies," by Adelbert Hamilton, in 28 *Cent. Law Jour.* 2.

c. Mistake.

HOME INSURANCE COMPANY *v.* MYER.

93 ILL. 271. — 1879.

MR. JUSTICE SCHOLFIELD. — This was a bill in equity, by appellee against appellant to rectify a mistake in a policy of insurance on a stock of goods and fixtures, and to enforce payment on the policy, when rectified, for loss.

The alleged mistake was in the description of the house in which were the stock of goods and fixtures. The policy describes the house as No. 57 Milwaukee avenue, Chicago, whereas it is alleged, the intention was it should have described it as No. 59 Milwaukee avenue, Chicago.

The mistake is denied in the answer, and it is also therein alleged that there was no intention to insure any property at No. 59 Milwaukee avenue. The evidence leaves no reasonable doubt that the mistake was made as alleged in the bill. Appellee is clearly shown to have no interest in the house, or its contents — No. 57 Milwaukee avenue. And it is also clearly shown that he did business at No. 59 Milwaukee avenue. Appellee swears that he applied for insurance on the stock and fixtures in No. 59, and that the appellant sent a solicitor, who examined No. 59 before the insurance was effected. The mistake appears to have been mutual, and it is such as is competent for a court of equity to rectify. * * *¹

VII. ILLEGALITY.

ERB *v.* GERMAN AMERICAN INSURANCE CO.

98 IA 606. — 1897.

GRANGER, J. — On the 22d day of August, 1893, the defendant company issued to the plaintiff its policy of fire insurance, to the amount of \$1,200, on a stock of drugs, patent medicines, etc., at Coon Rapids, Iowa, and on the 9th day of September, 1893, said stock of goods was destroyed by fire, and this action is to recover on the policy. The following are defenses pleaded, to each of which the court sustained a demurrer: “(8) The defendant says that there was conducted, in the building described in the petition, and by means of the property insured in said policy, a pharmacy, at the time said insurance was written, and up to the time of said fire, by

¹ See also *Noel v. Ins. Co.*, 130 Pa. 523.

the said B. F. Erb, and that said B. F. Erb had no permit to do business as a pharmacist, and that his business was conducted in violation of the laws of the State of Iowa, and that this fact the plaintiff concealed from this defendant, at the time this insurance was written, and at all times thereafter — the fact that he was conducting a pharmacy contrary to the laws of the State of Iowa, and without a permit to conduct such a pharmacy, and in violation of the statutes of Iowa — which concealment was a material fact concerning this insurance, and by the terms of the policy renders the same void. (9) Defendant further says that said Erb was engaged, at the place described in the petition, and by means of the appliances and property insured in the policy, in illegally selling intoxicating liquors, at the time said policy was written, and thereafter up to the time of the fire, and that said Erb was not a registered pharmacist, neither had he any permit to sell or deal in intoxicating liquors, and these facts were all concealed from the defendant, and which facts are each and all of them material facts concerning this insurance; and by the express terms of this policy the same is rendered void by such concealment.” An amendment to the answer was filed, having reference to some particulars of the defenses in question; but it deals mainly with conclusions of law, and, as to facts, it seems to add nothing to the sufficiency of the defenses pleaded, and hence it need not be set out.

The proposition for consideration, as presented by appellant, is: “Can there be a recovery on an insurance policy covering articles of merchandise which are owned and kept and used in violation of the laws of the State?” It is urged that to permit such a recovery would be against public policy. The line of authorities coming to our notice, to aid in the solution of the question, is quite limited. Those nearest to sustaining appellant’s view are in Massachusetts. In *Kelly v. Insurance Co*, 97 Mass. 284, the insurance was on a building that, in violation of the conditions of the policy that the building should not be occupied or used for unlawful purposes, was used for gambling, in violation of law, which avoided the policy. The case seems to have no bearing on the facts of this case. *Kelly v. Insurance Co*, Id. 288, is a case in which the insurance was on a stock of liquors kept by the assured for sale in violation of law. The policy covered the liquors and casks containing them. The opinion holds the policy void, and, speaking of the assured, it closes with the words: “His contract was in contravention of law, and void as to him, because he entered into it in order to protect himself in his illegal acts.” The case, as to authority, is grounded on holdings in cases involving marine insurance. In such cases the

rule is announced that "the illegality of the voyage in all cases avoids the policy, and the voyage is always illegal when the goods or trade are prohibited, or the mode of its prosecution violates the provisions of the statute." In *Boadman v. Insurance Co.*, 8 Cush. 583, it was sought to avoid policies of insurance on a building and personal property, consisting of leather and materials for the manufacture of shoes. The evening before the fire, persons assembled in a room in the building and conducted a lottery, which was a use of the room for an unlawful purpose. The rule of the case is stated as follows: "The drawing of a lottery, with the consent and participation of the assured, in a building insured against loss by fire as a shoe manufactory, does not avoid the policy on the building, nor on the stock therein." In the opinion is the following language:

"The distinction between cases where contracts are or are not void, as against law, is well stated by Marshall, C. J., in *Armstrong v. Toler*, 11 Wheat. 271. The principle established is that, where the consideration is illegal, immoral, and wrong, or where the direct purpose of the contract is to effect, advance, or encourage acts in violation of law, it is void. But, if the contract sought to be enforced is collateral and independent, though in some measure connected with acts done in violation of law, the contract is not void." This rule is followed in *Johnson v. Insurance Co.*, 127 Mass. 555, in which a policy was held void. In *Insurance Co. v. De Graff*, 12 Mich. 124, the policy included, among other things, groceries, among which were liquors, and the policy was claimed to be void, because to sustain the policy with liquors included would be insuring an illegal traffic. The case is quite in line, on principle, with the one at bar. The case briefly treats of the rule as to marine insurance, holding it to be inapplicable, and, as suggesting a state of facts that would be applicable, it is said: "If this policy were, in express terms, a policy insuring the party selling liquor against loss by fine or forfeiture, it would be quite analogous. But this insurance attaches only to property, and the risks insured against are not the consequences of illegal acts, but of accident." In the opinion it is further said: "By insuring his property, the insurance company has no concern with the use he may make of it; and, as it is susceptible of unlawful uses, no one can be held to contract concerning it in an illegal manner unless the contract itself is for a directly illegal purpose. Collateral contracts, in which no illegal design enters, are not affected by an illegal transaction with which they may be remotely connected." The case cites *Insurance Co. v. Polleys*, 13 Pet. 157, and *Armstrong v. Toler*, 11 Wheat. 258. It is there said: "It is difficult to perceive how public policy can be violated by an

insurance of any kind of property recognized by law to exist." In *Carrigan v. Insurance Co.*, 53 Vt. 418, the Massachusetts cases and the Michigan cases are noticed, and the case quotes much of the language we have quoted from them. The policy in that case covered a stock in trade consisting of groceries, provisions, drugs, * * * including wines and liquors. In the case at bar, as in that one, liquors are included in the terms of the policy. In that case it is said: "If the purpose of the contract in question had been to protect the assured in the sale of intoxicating liquors, it would have been null; but the greater part of the property insured consisted of goods insurance upon which was subject to no objection. The contract was legal on its face, nothing appearing to show that the wines and liquors were intended for illegal sale; and it is a fact, not needing proof, that in compounding medicines, liquors, especially wines and alcohol, are of daily use, and for that purpose their possession and use by druggists are legitimate. The assured was a dealer in drugs and medicines, and in that respect legitimately and presumably using liquors. There was evidence tending to show that he legally sold them, including those not used in compounding medicines; and the fact may have been that the latter trade was the larger and the main one. If such illegal traffic was the business of the assured, and his legal traffic and transactions with other property a mere cover, ostensibly carried on for the purpose of enabling him to secretly disguise his iniquity, the purpose of the contract would be to protect him in illegal ventures, and it would therefore, be void; but if he carried on business, using alcoholic liquors legitimately in his drug trade, and occasionally sold them in violation of law, we think that, if no legal design entered into the making of the contract in its inception, that it would be so far collateral to the illegal acts that it would be inconsistent, and in accordance with no well-adjudged case, to hold it null." The case of *Pollard v. Insurance Co.*, 63 Miss. 244, is determined upon a statute making contracts void, and is of no force as authority in this case. This case, in some respects, differs from any we have noticed or cited; but we think the rule of the Michigan and Vermont cases announces the correct doctrine.

The following is the property insured, as stated in the policy: "\$1,200 on his general stock of drugs, patent medicines, lamps and lamp goods, paints, oils, stationery, books, wall paper, liquors, fancy and toilet articles, and druggists' sundries." It shows much property insured, outside of liquors and drugs, for which permits to sell must be obtained. The facts to bring the policy within the rule to make it void are wanting. The drugs and the liquors are

recognized property in this State, and as legitimate subjects of insurance as other property. It is the illegal use of them that gives rise to the questions before us. We have not seen a case in which, because of the mere use of property for illegal purposes, not increasing the hazard in the absence of stipulations to that effect, a policy has been held void because of such use. It is not a case in which the contract itself is against public policy, by the parties, at the inception of it, intending it to be in aid of purposes or designs to violate the law. This case simply presents the question whether, where a party uses property for an unlawful purpose that is susceptible of legitimate use, such use will render the insurance contract void, as against public policy. We think that no authority sustains such a rule, and it does not seem to be dictated by reason. * * * :

KYTE v. COMMERCIAL UNION ASSURANCE CO.

149 MASS. 116. —1889.

[*Reported herein at p. 142.*]

¹ See *Hatch v. Co.*, 120 Mass. 550, digested herein at p. 309, *note*.

PART III.

CONSTRUCTION OF THE CONTRACT.

WESTERN & ATL. PIPE-LINES v. HOME INSURANCE CO.

145 PA. 346. — 1891.

STERRETT, J. — This action is on a policy of insurance issued by the Home Insurance Company, defendant, insuring the Western & Atlantic Pipe-Lines for one year from June 28, 1888, against loss or damage by fire to the amount of \$2,500, "on oil while contained in the iron crude-oil tank known as 'No. 1,' on plan situate, detached 273 feet, on the Johnson farm, at Johnson's Station, on the line of the Washington branch of the Pittsburgh, Cincinnati & St. Louis Railroad, on leased ground, Washington county, Pa." By necessary implication, the verdict established the fact that, during the life of the policy, over 3,600 barrels of oil were destroyed by fire while in said "iron crude oil tank known as 'No. 1,' " on the plan of oil tanks at Johnson's Station. The jury found in favor of the plaintiff for the value of the oil thus destroyed.

The company defendant, after being fully advised as to the loss, etc., denied its liability on two grounds: (1) Because the tank containing the oil insured had been removed "by an unforeseen disaster, in the shape of a flood," and carried about four or five hundred feet from the position it occupied when the policy was issued. (2) Because the oil contained in said tank did not belong to the plaintiff company, but to its customers, for whom it was held in storage, which fact was not stated on the face of the policy.

Conceding the fact that, at the time of the fire, the tank had been removed by a flood about four or five hundred feet from the position in which it stood when the oil was insured, but not off the premises described in the policy, the plaintiff contends that the insurance company was not thereby relieved from liability for the loss. In that we think it is right. The object of the contract was indemnity against the destruction of oil described as "contained in the iron crude-oil tank known as 'No. 1,' " etc. With the view of attaining that object, the terms of the policy should be construed

liberally. If any doubt exists as to their meaning, it should be resolved in favor of insured, rather than in the interest of the underwriter. When words employed in a policy of insurance are susceptible of two interpretations, that which will sustain the claim of the insured should be adopted. Wood, Ins. 145; May, Ins. 182. Tested by these well-recognized principles of interpretation, the position contended for by the defendant company is untenable. In substance, its position is that the above-quoted description of the property insured is, in effect, a warranty that, in case of fire, the oil destroyed shall not only be contained in said iron tank, but that the tank itself shall remain where it was when the insurance was effected; otherwise the insurance company will not be liable. Authorities cited in support of that position, where property insured as contained in certain barns, houses, etc., was destroyed after removal to other buildings, have no application to the case before us. In those cases there was necessarily a failure to show that the insured property was in the designated buildings when destroyed. In this case the jury must have found that the oil insured was destroyed "while contained in the iron crude-oil tank known as 'No. 1'" on the plan of tanks at Johnson's Station, and that, we think, fully satisfies the terms of the contract. The parties were not contracting with reference to an insurance upon the tank, but only upon the oil contained in it.

With that construction of the company in view, the learned president of the Common Pleas rightly instructed the jury as follows: "If you conclude that this tank was picked up bodily by the flood, and floated down the stream, and lodged from three to five hundred feet away from the place where it was constructed, against the abutments of the bridge, and remained intact, and in that way held the oil, as an oil tank would hold oil, so that it could have been recovered by the company, and while there, in place of on the original foundation, the oil in the tank was burned, then the contract of indemnity would be binding, and the defendant would be liable for such loss as the plaintiff might sustain by reason of the fire on their proportionate share of the loss." The jury, under this instruction, having found for the plaintiff, and assessed its damages, the necessary implication is that they found the facts of which the instruction is predicated to be true; that the oil tank No. 1 contained and held the oil, for the value of which they assessed damages in favor of the plaintiff, until it was destroyed by fire, etc.

But assuming, merely for argument's sake, that the description of the tank's location may be regarded as in the nature of a warranty, it can only be construed as a warranty of location at the time

the insurance was effected, and not that the tank would thereafter remain in the same location. *Insurance Co. v. Mitchell*, 48 Pa. St. 367. As a statement of then existing facts, it is not even pretended that the description of the location of the tank, etc., was not strictly true. If it was intended to make the continued location of the tank at the precise point where it then was a condition of the underwriter's liability, it would have been an easy matter to have said so. It is not the province of courts to indulge in conjectures favorable to such insurance companies as are disposed, upon mere technicalities, to avoid the payment of honest claims. Cases are not unfrequent in which statements in regard to the use and character of buildings, etc., are construed as merely descriptive of the risk at the time the application is made, and not as a warranty that there shall be no change during the life of the policy. *Wood, Ins.* §§ 444, 446, and cases there cited. In *Everett v. Insurance Co.*, 21 Minn. 76, a threshing machine was insured as "stored in a certain barn on section 36," etc., and it was held that this was a mere matter of description, operating to identify the property, and not a promissory stipulation on the part of the insured, nor a condition on the part of the insurer.

But, giving the defendant the benefit of the broadest construction, the language used in describing the location of the oil insured cannot amount to anything more than an implied warranty of the plaintiff company that it will not voluntarily change its location. This construction appears to have been recognized in *Sillem v. Thornton*, 3 El. & Bl. 868, and was perhaps warranted by the facts of that case. Even in that view, we have, on the one hand, only an implied warranty that the insured will not voluntarily change the location of the tank containing the oil, and, on the other, defendant's admission, in its affidavit of defense, that the location of the tank was changed "by a visitation of Providence." * * * [*Discussion of the second point omitted here.*]

Judgment affirmed.¹

¹ See also *Burleigh v. Ins. Co.*, 90 N. Y. 220, in which the clause "situate detached at least 100 feet" was construed to mean the same as if the policy had read "situate detached at least 100 feet from any other building of such character as to constitute an exposure and increase the risk."

For an emphatic and interesting statement of some of the causes which created the tendency of courts to construe insurance policies against the insurer, see Judge Doe's opinion in *DeLancey v. Ins. Co.*, 52 N. H. 581, 587; and also Judge Stone's opinion in *Piedmont &c. Co. v. Young*, 58 Ala. 476.

"We do not overlook the claim of defendant's counsel that the standard policy is in a form prescribed by State authority, and should no longer be subject

BALEY v. HOMESTEAD FIRE INSURANCE CO.

50 N. Y. 21. — 1880.

[*Reported herein at p. 158.*]

LOY v. HOME INSURANCE CO.

24 MINN. 315. — 1877.

[*Reported herein at p. 155.*]

to the rule that such contracts are to be construed most favorably to the insured. We need not determine how far this rule of construction should be held modified by the conditions stated. The terms employed in this policy had been in previous use in insurance contracts, and, as we have seen, had had a judicial construction. It is to be assumed that these terms were used in this policy in the sense in which they were previously used and defined." — *John Davi, & Co. v. Ins. Co.*, 115 Mich. 382, 385.

PART IV.

THE TERMS OF THE INSURANCE CONTRACT.

I. IN GENERAL.

a. Warranties.¹

b. Premiums.²

BRADLEY, J., IN NEW YORK LIFE INSURANCE CO. *v.*
STATHAM.

93 U. S. 24, 30. — 1876.

WE agree with the court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year, by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year—as in fire policies.³ But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten, or twenty annual instalments. Such instalments are clearly not intended as the consideration for the respective years in which they are paid; for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the whole life. The value of assurance for one year of a man's life when he is young, strong and healthy, is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual

¹ See Representations and Warranties, *ante*, p. 108.

² See also Consideration, *ante*, p. 92; Non-forfeiture, *post*, p. 268. For waiver of payment of premiums and waiver of other provisions of insurance contracts, see the topic Waiver and Estoppel, *post*, p. 417.

³ See extract from *Worthington v. Ins. Co.*, 41 Conn. 372, 399, *ante*, p. 93, *note*.

premium and the risk of assurance for the year in which it is paid. This idea of insurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance.

WHEELER *v.* THE CONNECTICUT MUTUAL LIFE INS. CO.

82 N. Y. 543. — 1880.

MILLER, J. — The complaint in this action sets forth alleged causes of action upon two separate policies of insurance, claiming to recover the amount named in each, and also alleges that a dividend was declared out of the surplus earnings and receipts of the company, for a portion of which the insured was entitled to a paid-up policy, which on demand was refused. The demurrer to the complaint presents the question whether any cause of action is set forth therein.

The policies upon which this action was brought provided for the payment of an annual premium, and contained a condition as follows: "That this policy shall not take effect until the advance premium hereon shall have been actually paid, during the life-time of the insured, and that if any subsequent premium on this policy be not paid when due, then this policy shall cease and determine (except as hereinafter provided), and this company shall not be liable for the payment of the sum insured herein, nor for any part thereof." The annual premium due on the 28th of October, 1873, was not paid; the complaint alleges, and upon demurrer it must be taken as true, that previous to the day last mentioned, Vose, the insured, became and was by the visitation and act of God, insane, and consequently unable to and did not pay the premium, although he had means to pay the same; but he was bereft of his reason and so continued until his death, which occurred March 17, 1874, and in consequence thereof did not know nor remember that said premium was then due, nor that he had agreed to pay the same.

Vose having died without a payment of the premium, according to the terms of the contract, the question arises whether his insanity is an excuse for non-payment and the forfeiture is thereby waived. Courts of equity will relieve against a forfeiture in many cases, but none of the decisions have gone to the extent of holding that

insanity will constitute an excuse for failing to comply with the terms of the condition referred to. In *Rose v. Rose* (Amb. 332), Lord Hardwicke laid down the rule thus: "Equity will relieve against all penalties whatsoever; against non-payment of money at a certain day; against forfeitures of copyholds; but they are all cases where the court can do it with safety to the other party; for if the court cannot put him into as good condition as if the agreement had been performed, the court will not relieve." Even if a condition subsequent becomes impossible by the act of God, or of the law, or of the obligee, etc., the estate will not be defeated. Co. Litt. 206 b. The defendant here could not well be placed in as good a condition as it had been, by the payment of the premium after the forfeiture, for by such payment it would be compelled to pay the amount named in the policies, thus adding to its obligation.

So also where the contract is for personal services, which none but the person contracting can perform, inevitable accident, or the act of God, will excuse non-performance. But when the thing or work to be performed may be done by another person, then all accidents are at the risk of the promisor. Story on Bailments, § 36 and notes; *Wolfe v. Howes*, 20 N. Y. 197; *Clark v. Gilbert*, 26 id. 279; *Spalding v. Rosa*, 71 id. 40. In the present case, the condition did not require the insured himself to pay the premiums, and it could have been done quite as well by any one on his behalf. After Vose became insane he was not really the party in interest. He had assigned the policies to his children, and they were the parties interested therein and to be affected by a failure to perform the condition of the contract. Although Vose was their guardian, if incapacitated by his insanity a competent person could have been appointed in his place, and hence his insanity was not necessarily an insuperable obstacle to their performance of the condition of the policy, and they were not relieved thereby. So long as the act could be performed by any other person, its performance did not depend upon Vose's continued capacity; and although rendered incapable by his insanity, the case is not within the rule which relieves a party from the consequences of an omission to do an act rendered impossible by omnipotent power. Broom's Legal Maxims, 6th Am. ed., 178, 179; *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 276. While as a general rule where the performance of a duty created by law is prevented by inevitable accident, without the fault of the party, the default will be excused, yet when a person by express contract engages absolutely to do an act not impossible or unlawful at the time, neither inevitable accident, nor other unforeseen contingency not within his control, will excuse him, for the reason that he might

have provided against them by his contract. *Dexter v. Norton*, 47 N. Y. 62; *Harmony v. Bingham*, 12 id. 99, 107; *Tompkins v. Dudley*, 25 id. 275. The principle thus established has been especially applied in reference to policies of insurance, where the payment of the premium is held to be a condition precedent which must be kept or the policy falls. *Roehner v. Knickerbocker Life Ins. Co.*, 63 N. Y. 160; *Evans v. U. S. Life Ins. Co.*, 64 id. 304; *Beebe v. Johnson*, 19 Wend. 500. In the case last cited it was laid down that to excuse non-performance, it must appear that the act to be done could not by any means have been accomplished.

The learned counsel for the plaintiff seeks to distinguish 63 N. Y. 160, and 64 id. 304, above cited, from the case at bar; but we are unable to perceive any such difference as prevents an application of the principle decided in these cases, and we think that they are directly in point upon the question discussed. Reliance is also placed upon the decisions of this court in *Cohen v. The N. Y. Mut. Life Ins. Co.*, 50 N. Y. 610, and *Sands v. The N. Y. Life Ins. Co.*, id. 626, to sustain the theory of the plaintiff. Those decisions hold that the occurrence of war between two States forbid and excused the transmission and payment of premiums on the policies then in question from one State to another, and legally excuses their payment; and as the premiums could not be paid as they fell due, they were suspended, and a tender, after the termination of the war, with interest, renewed the policies.¹ This condition of affairs arises from the belligerent attitude between the hostile States, which rendered it impracticable to comply with the terms of the contract. War necessarily prevented communication between the citizens of such States; and as it existed without the fault of the insured, in the cases cited, and for that reason no intercourse could be maintained for business purposes, the insured were not in any sense in fault for a failure to comply with the conditions contained in the policies in question. As it was impossible for either one of the insured to pay the premium required, or to procure any one else to do so upon his behalf, there is no satisfactory reason why he should not be excused. This rule which is well settled by the law of *nations*, rests upon the grounds of public policy by which

¹ *Contra*, *New York Life Ins. Co. v. Statham*, 93 U. S. 24, in which the court concludes that "the policies in question must be regarded as extinguished by the nonpayment of the premiums, though caused by the existence of the war, and that an action will not lie for the amount insured thereon. Secondly, that such failure being caused by a public war, without the fault of the assured, they are entitled *ex æquo et bono* to recover the equitable value of the policies with interest from the close of the war."

contracts between belligerent States are suspended during the war, but are not annulled. This doctrine is founded upon the principle that the state, and not the individual, wages the war. Phil. Int. Law, 666; Wheat. Int. Law, 8th ed., 403, § 317. The cases cited are not analogous; for while the individual can pay or provide for payment through another, in case of war he is entirely helpless to fulfill and carry out the contract, and at the mercy of the government. The authorities of the hostile States have placed it beyond his control, suspended all intercourse, stopped all business relations, and laid a heavy arm upon all communications between their citizens. As there is no ability to fulfill, no means of paying, the justice and propriety of the rule is apparent, while its application in the case at bar cannot be upheld upon any such ground. There is, we think, a wide distinction in principle recognized in the books between inability to fulfill the terms of the contract, where, by the act of two governments war intervenes and prevents a fulfilment, and where the default arises from a duty or charge which has been assumed by the party and is capable of fulfillment either by himself or by another on his behalf.

While the court of equity will interpose its power to relieve against forfeitures for a breach of a condition subsequent caused by unavoidable accident, by fraud, surprise or ignorance, in many cases, that power has never been extended so as to excuse a breach of contract of this description arising from the disability of a party caused by sickness or insanity.

The case of *Baldwin v. The N. Y. Life Ins. Co.*, 3 Bosw. 530, which is cited and relied upon by the appellant, involved no question as to the non-payment of the premium but related to a provision in the contract whereby the insured was licensed to travel in prohibited localities, returning within a specified period, and was prevented by illness from performing the condition. It was analogous to contracts for personal services, to which reference has been had, and the authority has no application in the case considered. Besides it is overruled by *Evans v. U. S. Life Ins. Co.*, *supra*. In the case at bar, it is not claimed that the performance was strictly impossible, and therefore that it was excused by law or that equitable relief should be granted upon that ground; and we are unable to discover that a case is made out, within any acknowledged principle, which authorizes the interposition of a court of equity.

Nor is there any ground for claiming that, by the provisions of the contract, the intention of the parties was that the terms of payment should not be obligatory in case of unavoidable sickness or insanity. The law places a reasonable construction upon all con-

tracts, but in cases of insurance policies, where the prompt payment of premiums is an important element of the business, and forms the basis of its calculation by the compounding of interest thereon, it is scarcely to be supposed that such payment can be waived, except in conformity with some established rule of law or by express agreement.

The claim of the plaintiff that the moneys in possession of the company belonging to Vose, being dividends on the policies in question, should be applied in payment of the premiums falling due, is without merit, as such dividends would have been insufficient to pay the premiums due, even if applied. Nor were the company bound to pay such dividends to the insured and notify him that the policy was forfeited if not applied. The money was never demanded, nor any request made to apply the same; and hence the defendant was under no obligation to apply or to pay the dividends on account of the premiums. * * *

McALLISTER v. NEW ENGLAND MUTUAL LIFE INSURANCE CO.

101 MASS. 558. — 1869.

ACTION upon a life policy. It was agreed by plaintiff and defendants that when the defendants delivered the policy they took for the first annual premium \$30.12, in cash and two promissory notes;

¹ " Promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion." — *N. Y. Life Ins. Co. v. Statham*, 93 U. S. 24, 30. See also *Thompson v. Co.*, 104 U. S. 252; *Klein v. Co.*, 104 U. S. 88; *Carpenter v. Co.*, 68 Ia. 453.

An insurance agent having authority to negotiate contracts of life insurance has no implied authority to contract for the payment of the premiums in goods. — *Hoffman v. Ins. Co.*, 92 U. S. 161.

In *Whiting v. Ins. Co.*, 129 Mass. 24, where it was provided in the policy that it " shall not take effect until the advance premium hereon shall have been paid during the lifetime of the person whose life is hereby insured " it was held that a payment of the advance premium by a third person, without the knowledge of the assured, is of no effect; for whatever may be the law as applicable to the payments of annual premiums under a policy which has once attached, a contract of insurance cannot be originally created without the consent of the assured.

one dated April 16, 1866, payable in six months; and the other, dated April 11, 1866, payable on demand after five years. Samuel McAllister, the life insured, died March 7, 1867.

GRAY, J. The policy upon which this action is brought is expressed to be made in consideration of a premium already paid, and of a like sum to be paid annually during its continuance; and "does not take effect until the premium is paid." But it is agreed by the parties, in the case stated, that the defendants made and delivered the policy to the assured, and at the time of the delivery took for the first premium a certain sum in cash, and two notes of the assured, one payable in six months and the other on demand after five years. Whatever were the powers of the directors, the corporation itself might certainly take notes for part of the premium, instead of insisting on immediate payment of the whole. *Hodsdon v. Insurance Co.*, 97 Mass. 144. The policy thus took effect as a binding contract, and the question is whether it was terminated before the death of the assured.

The defendants rely upon that provision of the policy, which declares, that, "in case any premium due upon the policy shall not be paid at the day when payable, the policy shall thereupon become forfeited and void," except for a certain period which had expired before the death of the assured in this case. But the court is of opinion that this clause, which is inserted for the benefit of the insurers, and to be construed most strongly against them, and which merely provides that the policy "shall become forfeited and void," in case a premium "shall not be paid at the day when payable," can only apply to a policy which has once taken effect, and to non-payment of a premium payable after that time, and cannot be held to refer to that premium which the policy contemplates and requires to be paid before the contract of insurance has any binding force.

This policy does not provide that it shall be avoided or forfeited upon the failure to pay any note or obligation given for a premium, and differs in that respect from the cases of *Pitt v. Insurance Co.*, 100 Mass. 500, and *Roberts v. Insurance Co.*, Disney, 355, cited for the defendants.

The subsequent stipulation, by which the policy, and any sums that shall become due thereon from the company, are pledged and hypothecated to them to secure the payment of any premium on which credit may be given, and of any note or security therefor, expressly declares that "this pledge and hypothecation shall in no respect affect the provisions respecting the forfeiture of the policy," and cannot therefore enlarge those provisions.

The difference also in the form of the two notes taken by the defendants for part of the premium — that for the smallest amount and payable in the shortest time omitting the provision, which is carefully inserted in the other, of “said policy being agreed to be subject to forfeiture, and to become void in case of non-payment of interest and principal of this note in compliance with the terms thereof” — accords with the construction that non-payment of the first note was not intended to have the effect of avoiding the policy.

The refusal of the assured to pay that note after it had become due, accompanied by the statement that “he would not have anything more to do with the company, and abandoned the whole thing,” does not appear to have been assented to by the company; for the company continued to hold the notes, and the assured to hold the policy.

The defendants, having admitted the death of the assured and due notice and proof thereof, and having failed to show that the policy was forfeited, canceled, or in any way avoided or determined before his death, are liable to his administratrix in this action.

Judgment for the plaintiff.

II. TERMS OF THE FIRE INSURANCE CONTRACT.

a. Respecting Matters Before Loss.

1. INCREASE OF HAZARD.

KYTE v. COMMERCIAL UNION ASSURANCE CO.

149 MASS. 116. — 1889.

C. ALLEN, J. These policies were in the form of the Massachusetts Standard policy, and each provided that “This policy shall be void * * * if, without such assent [namely the assent in writing or in print of the company], the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risks, * * * or if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law.” Various other circumstances were enumerated which would also avoid the policy. At the beginning of the trial, the defendant waived every defence except increase of risk. The defence of the illegal keeping of intoxicating liquors, as a separate and distinct defence, was therefore waived.

We have to consider, in the first place, whether the instructions

requested by the defendant were given in substance. The plaintiff contends that they were. The learned judge before whom the case was tried adopted in substance the third and fifth instructions asked for by the defendant, and thus instructed the jury, that if they should find that during the time for which these policies were issued the plaintiff Kyte, by obtaining a victualler's license and making use of this building under said license, and legally or illegally selling intoxicating liquors therein, increased the risk, then this policy became void as to the plaintiff Kyte, and he should not recover for his interest therein; and if they should find that while these policies were in force intoxicating liquors were kept and sold in this building by the plaintiff Kyte, or with his consent or knowledge, and that thereby the risk was increased, this policy became void as to his interest, and he could not recover. This was a general and broad instruction, including the increase of risk by using the premises as a common victualling place, or as a place for selling intoxicating liquors legally or illegally, and well covered the general question of the effect of an increase of risk. From this instruction, taken alone, a jury might well have inferred that the policy would be void in case of any such increase of risk at any time during the time covered by the policies and before the fire.

But the defendant, in the fourth request for instructions, asked for a special instruction, adapted to the case of a temporary increase of risk which had ceased before the time of the fire; that is to say, that if the jury should find that, by the illegal sale of intoxicating liquors in this building by the plaintiff Kyte, or by others with his consent and knowledge, for a certain portion of the time for which these policies were issued, the risk was for that period increased, this policy would be void as to Kyte's interest, and he could not recover, although this increase was not permanent. The judge declined to give this ruling, and instructed the jury, in substance, that if that illegal use was temporary, not contemplated at the time when the policy was taken by the plaintiff, and ceased before the fire, then the fact that he had made an illegal use of the premises in 1882, which was during the time covered by the policy, would not deprive the plaintiff of the right to maintain the action; and that his right under the policy, if suspended while the illegal use of the building continued, would revive when he ceased to use it illegally. This instruction did not in express terms mention the subject of an increase of risk by the illegal use of the premises for selling liquor; but the instruction was given in the place of the fourth request for instructions, and that request was refused, the judge saying that he had given what would be entirely inconsistent

with it. The question is thus presented whether the provision of the policy that it shall be void in case of an increase of risk means that it shall be void only during the time while the increase of risk may last, and may revive again upon the termination of the increase of risk. The provision is that the policy shall be void if any one of several circumstances successively enumerated shall be found to exist. Some of these circumstances relate to the time of issuing the policy, and others could not arise till afterwards. They are of different degrees of importance, some of them going to the essential matters of the contract, and others being comparatively trivial in character. The language of the policy is the same in respect to them all, that the policy shall be void.

In *Hinckley v. Germania Ins. Co.*, 140 Mass. 38, the policy was in the same form as those in the present cases, and for a short time during the term of the policy the plaintiff kept a bowling alley and billiard table without having any license therefor. There was no question of increase of risk, or other actual prejudice to the insurer; and under these circumstances two questions arose: first, whether the plaintiff's act fell within the provisions that the policy should be void if gunpowder or other articles subject to legal restrictions should be kept in a manner different from that allowed by law; and secondly, whether, assuming that the policy would be void during the time of the illegal keeping of the bowling alley and billiard table, it would revive after such temporary use had ceased. In deciding the case, the court intimated that the plaintiff's act was not within the meaning of the provision in the policy, unless the risk was thereby increased, but placed the decision upon the second ground, that the policy would revive. The court now thinks it would have been better to place the decision of this part of the case solely upon the first ground, leaving it an open question whether a departure from the terms of the provision of the policy, without an increase of risk, may be deemed merely to suspend, and not absolutely to avoid the policy. However that may be, we think an increase of risk entitles the insurer to avoid the policy absolutely. The contract of insurance depends essentially upon an adjustment of the premium to the risk assumed. If the assured by his voluntary act increases the risk, and the fact is not known, the result is that he gets an insurance for which he has not paid. In its effect upon the company, it is not much different from a misrepresentation of the condition of the property.

If the provision stood alone, that in case of any material misrepresentation as to the risk or any voluntary increase of risk afterwards the policy should be void, it could hardly be doubted that the

words should be taken in their natural, obvious meaning. The fact that with this are coupled the other provisions above referred to, does not change its meaning with reference to the effect and consequence of an increase of risk. An increase of risk which is substantial, and which is continued for a considerable period of time, is a direct and certain injury to the insurer, and changes the basis upon which the contract of insurance rests; and since there is a provision that, in case of an increase of risk which is consented to or known by the assured, and not disclosed and the assent of the insurer obtained, the policy shall be void, we do not feel at liberty to qualify the meaning of these words by holding that the policy is only suspended during the continuance of such increase of risk. *Lyman v. State Ins. Co.*, 14 Allen, 329; *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530. It follows, therefore, that the fourth instruction which was requested, or something in substance like it, should have been given. Upon the facts stated and assumed, the increase of risk, if there was one, continued for fifteen months, and could not be treated as a casual, inadvertent, or inevitable thing.

Exceptions sustained.¹

¹ The use, near the insured property, of a corn-sheller with and engine an boiler to propel it, is a change in exposure within the clause "change in the exposure, by the erection or occupation of adjacent buildings, or by any means whatever within the control and knowledge of the insured;" the trial court having erroneously construed the exposure contemplated by the clause to be an exposure arising by erection of a permanent structure, or by change in the use of an existing adjacent structure. — *Davis v. Ins. Co.*, 81 Ia. 496. See also *Washington Mut. Ins. Co. v. Ins. Co.*, 5 Ohio St. 450.

In *Jauvrin v. Ins. Co.*, 46 Atl. Rep. 686, (N. H.), where there was a clause in the policy making it void if the "situation or circumstances affecting the risk shall, with the knowledge of the insured be so altered as to cause an increase of such risk," a third party erected upon his own land, but near the property insured, a building which was used as a grocery store and public hall. At the date of the policy the other exposures were farm risks or dwellings. The court said: "The effect of the provision, when there is a substantial increase of the risk known to the assured, is to invalidate the policy unless the company assent to the changed conditions. Although this construction avoids the policy by reason of the acts of persons other than the assured, and in respect to property other than that insured, yet, where the stipulations of the contract plainly so provide, it has been upheld in this and other jurisdictions." It was held to be a question for the jury whether the risk had been thereby increased.

2. OTHER INSURANCE.

TURNER v. MERIDAN FIRE INSURANCE CO.

16 FED. 454 (Circuit Ct., Dist. R. I.). — 1883.

BEFORE LOWELL and COLT, JJ.

COLT, J. — On July 9, 1879, the defendant issued a policy of insurance to the plaintiff, running for five years. Afterwards, on November 15, 1880, the plaintiff took out another policy for five years, covering the same property, in the Springfield Fire & Marine Insurance Company. The property was destroyed by fire March 8, 1881. Both policies contained a provision that they should be void in case the insured "shall have or shall hereafter make any other insurance on the property," without the written consent of the company. No notice was given of other insurance to either company, nor was the fact discovered until after the fire. The Springfield Company, on learning that the plaintiff had another policy in the defendant company, declined to pay the loss. Afterwards, in October, 1881, the Springfield policy was surrendered and canceled on payment of \$200 to the plaintiff. The company, however, always denied any legal liability. The defendant also refused payment of its policy, on the ground of subsequent insurance in the Springfield company, and false swearing in relation thereto in the proofs of loss. This suit was brought in February, 1882, in the Rhode Island State Court, and afterwards removed here. The case was heard by the court, jury trial having been waived.

The main question to be determined upon this motion is whether the defendant company can hold its policy to be invalid by reason of the subsequent policy taken out in the Springfield Company. What constitutes other insurance, within the meaning of this condition in insurance policies, is a question upon which courts have widely differed. The doctrine laid down by the highest tribunals of Massachusetts and some other States is that the subsequent insurance being invalid, at the time of loss, by reason of the breach of condition therein, the prior insurance is good, even though the second company waive the forfeiture and pay its policy in full. *Thomas v. Builder's Ins. Co.*, 119 Mass. 121; *Jackson v. Mass. Fire Ins. Co.*, 23 Pick. 418; *Clarke v. New England Fire Ins. Co.*, 6 Cush. 342; *Hardy v. Union Ins. Co.*, 4 Allen, 217; *Lindley v. Union Ins. Co.*, 65 Me. 368; *Philbrook v. New England Fire Ins. Co.*, 37 Me. 137; *Gee v. Cheshire Co. Ins. Co.*, 55 N. H. 65; *Gale v. Ins. Co.*, 41 N. H. 170; *Schenck v. Mercer Co. Ins. Co.*, 4 Zab. 447; *Jersey City Ins. Co. v. Nichol*, Am. Law Reg., Sept., 1882, p. 620; *Stacey v. Franklin Ins. Co.*, 2 Watts & S. 506; *Sutherland v. Old Dominion Ins.*

Co., 8 Ins. Law J. 181, (Va. Ct. of Appeals); *Ins. Co. v. Holt*, 35 Ohio St. 189; *Knight v. Eureka Ins. Co.*, 26 Ohio St. 664; *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520; *Allison v. Phoenix Ins. Co.*, 3 Dill. 480. On the contrary it is held, elsewhere, that a subsequent policy, whether legally enforceable or not, or whether voidable on its face or voidable for extrinsic matter, works a forfeiture of the prior policy. *Somerfield v. Ins. Co.*, 8 Lea, 547; *Funke v. Minnesota Farmers' Ins. Ass'n*, 15 Rep. 114, 29 Minn. 347; s. c., 13 N. W. Rep. 164; *Suggs v. Liverpool, London & Globe Ins. Co.*, 9 Ins. Law J. 657, (Ky. Ct. of Appeals); *Allen v. Merchants' Ins. Co.*, 30 La. Ann. 1386; *Lackey v. Georgia Home Ins. Co.*, 42 Ga. 456; *Bigler v. N. Y. Cent. Ins. Co.*, 22 N. Y. 402; *Landers v. Watertown Ins. Co.*, 86 N. Y. 414; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495; *Jacobs v. Equitable Ins. Co.*, 19 U. C. Q. B. 250; *Ramsey, etc., Co. v. Ins. Co.*, 11 U. C. Q. B. 516; *Mason v. Ins. Co.*, 37 U. C. C. P. 47; *Royal Ins. Co. v. McCrea*, 8 Lea, 531; *Equitable Ins. Co. v. McCrea*, Id. 541.

There is still another view taken by the Supreme Court of Iowa, in the case of *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325, to the effect that the question of recovery under the prior policy turns upon whether the subsequent policy has been in fact avoided. If the subsequent policy is recognized by the company issuing it as a valid policy, any breach of condition being waived, this makes it a valid insurance, and constitutes it a good defense to an action upon the prior policy; but if the subsequent policy has been avoided by the company, there is no other insurance, so as to defeat a recovery on the prior policy. Although at first this reasoning may strike the mind as a fair compromise between the other conflicting positions taken upon this question, it is a subject of such grave objections that it cannot be considered tenable.

If the condition in the first policy was violated, it was done at the time the second contract of insurance was entered into, and the subsequent affirmance or disaffirmance of the second contract, should not affect the validity of the first. The validity of the first contract can hardly turn upon what a stranger to it may do with reference to another contract, even after liability upon the first contract has become absolute by a destruction of the property. *Funke v. Minnesota Farmers' Ins. Ass'n*, *supra*.

At the trial of the cause it seemed as if the weight of authority was in favor of holding the prior policy good upon the ground that the subsequent policy was invalid, and this position had been held by Judge Dillon in *Allison v. Phoenix Ins. Co.*, 3 Dill. 480, not to be in conflict with the real point in judgment in *Carpenter v.*

Providence Washington Ins. Co., 16 Pet. 495; but upon further consideration of all the authorities, and the principles which govern them, we cannot adopt this view.

This construction is open to the objection that the insured may collect both policies. It is also subject to the criticism that, in deciding upon the validity of one contract, the court, in the same action, must go outside of it, and determine, first, the validity of one or more independent contracts, involving perhaps, an inquiry into complicated questions of fact respecting those contracts. *Royal Ins. Co. v. McCrea*, 8 Lea, 538. But further than this the principle upon which this construction is founded does not appear to be satisfactory. The reasoning in these cases is based largely on the assumption that the second policy is *void* by reason of the breach of condition therein, and that the issuing of such a void policy is no violation of the condition as to other insurance in the first policy. But is not this assumption too broad? Is it legally true that the second policy is a void contract? Conditions of this character in insurance policies are inserted for the benefit of the insurer, and their violation does not render the policy void, but only voidable at the election of the insurer. It is still a binding contract upon the insured. He can take no advantage of this breach of condition, and the insurer could still enforce the contract against him if anything was to be gained by so doing. "Although the policy by its terms provides that it shall be void on a breach of any of its conditions, its legal effect is simply to render it voidable at the election of the insurer, and that the insurer can waive the forfeiture and continue the policy in force; or, to state the proposition more broadly, in all contracts where the stipulations avoiding the same are inserted for the sole benefit of one of the parties, the word 'void' is to be construed as though the contract read 'voidable.' This view seems to be sound in principle, just in practice, and is certainly well sustained by authority." *Masonic Mut. Benefit Society v. Beck*, (Sup. Ct. of Indiana); 11 Ins. Law J. Oct. 1882, p. 755; *Armstrong v. Turquand*, 9 Irish C. L. 32; s. c., 3 Life & Acc. R. 350. The party in default cannot defeat the contract. *Viele v. Germania Ins. Co.*, 26 Iowa, 1. The policy is merely voidable, and may be avoided by the underwriters upon due proof of facts, but until so avoided it must be treated for all practical purposes as a subsisting policy. *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495. See, also, *Baer v. Phoenix Ins. Co.*, 4 Bush, 242, and authorities before cited. The doctrine of waiver as applied to conditions in policies of insurance, and which is invoked so frequently, is founded, in part at least, upon the theory that breach

of condition only renders the policy voidable. The same principle prevails as to conditions in leases where the term "void" is used. The leases become void only by the lessor's electing to treat it so, and not by the mere happening of the breach, and modern decisions have quite exploded the old distinction in this respect between leases for years and for life. *Viele v. Germania Ins. Co.*, 26 Iowa, 70, note; *Taylor, Landl. & Ten.*, § 492. As the second policy is not a void contract, but only voidable at the election of the company, as it is a contract entered into by the insured, and which he cannot dispute, and as the reason, if any, why he cannot legally enforce it arises from his own neglect or misrepresentation, may it not be fairly claimed that this is other insurance within the meaning and intent of the condition in the first policy? We think the rule, supported as it is by authorities of great weight, which holds the taking out of a voidable policy a violation of the provisions respecting other insurance in the first policy, the best one, and subject to less serious objections than any other.

What was the position of this plaintiff at the time of the loss? He had one policy of insurance in the defendant company, and he had another policy of later date in the Springfield Company. This second policy was issued in good faith by the Springfield Company and the premium paid. It was a policy, the validity of which the plaintiff could not deny, and upon which he obtained \$200 by way of compromise. It seems to us that upon any fair rule of interpretation this must be considered a breach of the condition as to other insurance in the defendant's policy. We cannot bring our minds to assent to the proposition that a subsequent contract of insurance, binding upon the assured, and which the company may pay in full or in part is no violation of the first policy. We believe the general rule, that conditions in insurance policies inserted for the benefit of the company should be strictly construed against it, to be a sound one, and we do not think our conclusion in this case inconsistent with this doctrine; at the same time we should bear in mind that this condition is a reasonable one, in that it is of great consequence to the insurer as a protection against fraud to know whether other insurance exists; and it is said, therefore, that this provision is not regarded with the jealousy due to other provisions which work a forfeiture, but is upheld as a fair and just provision for a reasonable and proper purpose. *May Ins.*, § 346.

New trial granted.¹

¹ "But it is insisted that by a second policy on the same property, effected without notice to, or the assent of, the first underwriter, the insurer may believe he has obtained an over-insurance whereby the temptation to carelessness, if not

3. OVERVALUATION.

BRADLEY, J., IN *SMITH v. HOME INSURANCE CO.*

47 HUN. (N. Y.) 30. — 1883.

THE policy was issued by one Farnam, the defendant's agent, at Warsaw, N. Y., upon an application obtained by one Randall, acting as solicitor. In the application signed by the plaintiff is his covenant that the statements, valuation, description and survey in it are

to incendiarism, on his part, will be greatly increased to the prejudice and probable loss of the insurer; and, to use the language employed in *The Phoenix Ins. Co. v. Lamar*, 106 Ind. 515, if a recovery be allowed on the first policy it "affords the anomalous spectacle of an insured avoiding the effect of apparent over-insurance and compelling payment of one policy by exhibiting his own turpitude in obtaining another." But the obvious vice of this position consists in its assumption, without proof, that the assured has acted in bad faith and necessarily has been guilty of fraud in securing the second insurance. There is no warrant in the law for making such an assumption in the absence of evidence; *Insurance Co. v. Holt*, 35 Ohio St. 192, or for its acceptance as a universal and unvarying rule. It is entirely possible, *first*, that two policies on the same property in the hands of the same individual will not in fact create an over-insurance; *secondly*, that the assured may not believe that the two policies create an over insurance even if in fact they do; *thirdly*, that the second may have been procured with a view of discontinuing the first, whilst the loss intervenes before the actual cancellation of the earlier one; and *fourthly*, that though legally chargeable with notice of the prohibition against other insurance, the assured may be in reality ignorant of its terms and may, with a view to secure additional indemnity whilst in absolute good faith procure the subsequent policy. In any one of these contingencies it would be going beyond a legitimate presumption to hold inexorably that fraud or turpitude tainted the conduct of the assured." — *Sweeting v. Ins. Co.*, 83 Md. 63, 74.

The New York standard policy provides (line 12) against other insurance 'whether valid or not.'

"The provision of this policy involved in behalf of this claim is as follows: 'If the assured, or any other person or parties interested, shall have existing during the continuance of this policy any other contract or agreement for insurance (whether valid or not) against loss or damage by fire on the property hereby insured, or any part thereof, not consented to by this company in writing, and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect.' * * * The designation, 'any other person or parties interested,' includes only persons or parties interested in the insurance merely. *Acer v. Insurance Co.*, 57 Barb. 68. The expression, 'any other contract or agreement for insurance,' found in this policy, does not apply to insurance procured by a third person without the knowledge and consent of the assured, said third person having or claiming an insurable interest in the property, and no interest in the policy issued to the assured. *May, Ins.*, § 372; 2 *Wood, Ins.*, § 377; *Insurance Co. v. Tyler*, 16 Wend. 385; *Insurance Co. v. Hone*, 2 N. Y. 235; *Burton v. Insurance Co.*, 14 U. C. Q. B. 342." — *Niagara Ins. Co. v. Scammon*, 25 N. E. 919, 922, 144 Ill. 490, 499.

true and correct, and are submitted as his warranty and a basis for the desired insurance. And the policy provides that such application, survey, plan and description, were considered part of the contract, and a warranty by the assured, and that any false representations by the assured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk or an overvaluation or any misrepresentation whatever, either in the written application or otherwise, would render the policy void.

It is contended that there was an overvaluation of the dwelling-house insured for \$700, which vitiated the policy. The valuation of this house, as stated in the application, was \$1,400, while the evidence tended to prove that its value did not exceed \$1,000. The mere statement of the value of property is ordinarily a matter of opinion. And although in this case the application containing it, is part of the contract of insurance, and the statements contained in it, warranties, it is difficult to apply it strictly to those which are necessarily matters of opinion so as to make the validity of the policy dependent upon the fact that the opinion of the assured was correct. If that were so the rule would require such a result in all such cases upon the finding of the jury that the statement in that respect is in excess of the value of the property insured, although the fact should exist in a conflict of evidence. Our attention is called to no case declaring that doctrine to the extent claimed for it by the defendant's counsel. And in analogy to the familiar rule on the subject it would seem that the mere statement of that which is necessarily, from its nature, matter of opinion, is not strictly within the term warranties as applied even to a contract of insurance. *Van Epps v. Harrison*, 5 Hill, 69; *Dacey v. Agr'l Ins. Co.*, 21 Hun, 83. And that the statement of value in such an application is not effectual as an overvaluation to defeat liability unless it is grossly or designedly excessive. *Redferd v. Mut. Fire Ins. Co.*, 38 Up. Can. (Q. B.) 538; *Ins. Co. of N. Am. v. McDowell*, 50 Ill. 120.¹ In this case the value stated in the application is not so excessive as to require the conclusion as matter of law, that it was an overvaluation within the meaning of the warranty, but the question in such case whether it was designedly excessive on the part of the plaintiff may be properly for the jury to bring it, as a false representation, within the warranty. But this house was not burned and it is not made the subject of claim in this action. Although in some of the States it is held that, where a policy of insurance covers different kinds of

¹ Accord in the case of valued policies, *Vergeront v. Co.*, 86 Wis. 425, 426; *Cushman v. Co.*, 34 Me. 487, 495.

property, the contract is entire although the valuation and amounts of insurance are severally applied to the different classes of property and that a breach of the warranty as to any portion of the subject of insurance vitiates the policy as a whole, especially when the consideration expressed is entire; that, however, is not the doctrine of this State as applied to contracts of insurance. And this is the general rule applicable to contracts. *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452; *Schuster v. Dutchess Co. Ins. Co.*, 102 id. 260; *Woodward v. Republic Fire Ins. Co.*, 32 Hun, 365, 373. The question of the effect of the policy upon the statement of excessive value of the house, if made fraudulently or with evil intent for any purpose, requires no consideration. While the use to which the fact would be entitled, if found, was a question of law for the court; whether or not such was the fact, was for the jury to find. No request was made to submit it to them, and no exception appears by the record presenting the question in that view. * * *

4. OWNERSHIP.

IMPERIAL FIRE INSURANCE CO. v. DUNHAM.

117 PA. 460. — 1888.

CLARK, J. * * * The insurance company further contends, however, that Seeley, at the time the insurance was effected, was not the absolute owner of the premises insured. By the second condition of the policy it is provided, that, "if the interest of the assured be other than the entire, unconditional, and sole ownership, or if the property insured be a building standing on ground not owned by the assured in fee simple," the policy shall be void and of no effect. On April 21, 1880, O. A. Seeley, by agreement in writing, purchased the lands in question from T. Smull's Sons; the consideration of his purchase was \$5,129.50, payable in three equal annual payments, the first installment becoming due December 1, 1880. On November 11, 1881, T. Smull's Sons conveyed the legal title and assigned the Seeley contract to F. T. Page, the effect of which was merely to put Page in the place of T. Smull's Sons as to Seeley. On February 8, 1883, the policy in suit was issued to Seeley. There is no evidence that Seeley paid any part of the purchase-money; he erected a sawmill, however, and made other improvements, and it is claimed that his interest in the land was greatly enhanced thereby at the time the insurance was

effected. On March 29, 1883, Seeley, by contract in writing, assigned his interest under the contract with T. Smull's Sons to Page, who thereupon at the same time sold by articles to Henry Dunham. The consideration of the last-mentioned sale was \$10,000; Page to receive \$5,759.18, being the balance, with interest unpaid, on the contract between T. Smull's Sons and Seeley; the residue being \$4,240.82, to be paid to and received by Seeley. There was a reservation of the title to certain timber and bark until the purchase-money was paid, an arrangement to apply part of the proceeds thereof to the purchase-money, and a provision that in the event of Dunham's failure to fulfill his contract, Seeley would resume his former relation to Page under the Smull contract. But we find nothing in the details of the several contracts of March 29, 1883, to vary the question already stated, viz.: whether or not Seeley's interest in the property insured was such as was required by his contract with the company. Where the title to property passes, and the policy is assigned to the vendee with the insurer's consent, the policy has sometimes been treated as a new contract with the vendee. Wood on Ins., § 110. But, under the decisions of this court, the assignee has always been held to take subject to all the stipulations contained in the policy, and in an action by the assignee, the question of interest to be referable to the time of the issuing of the policy. *State Mut. Co. v. Roberts*, 31 Pa. 438; *Lycoming Co. v. Mitchell*, 48 Pa. 367.

At the time the insurance was effected, Seeley, as we have said, had become the purchaser in fee of the property, under articles of agreement with T. Smull's Sons; he had the equitable title only, but he was to all intents and purposes the "owner" of the property; he was the equitable owner in fee, and, in respect to the insurance, we think he may be said to have been the entire, unconditional, and sole owner. This provision of the policy does not necessarily distinguish between the legal and the equitable estate. If the title is conditional or contingent, if it is for years only, or for life, or in common, it is not the entire, unconditional, and sole ownership; but the interest is the same, as it affects the contract of insurance, whether the title of the assured be legal or equitable. The purpose of this provision is, to prevent a party who holds an undivided or contingent but insurable interest in property, from appropriating to his own use the proceeds of a policy, taken upon the valuation of the entire and unconditional title, as if he were the sole owner, and to remove from him the temptation to perpetrate fraud and crime. For without this, a person might thus be enabled to exceed the measure of an actual indemnity. But where the

entire loss, if the property is destroyed by fire, must fall upon the party insured, the reason and purpose of this provision does not seem to exist; and in the absence of any particular inquiry as to the specific nature of the title, or of any express stipulation in the policy that the insured held the legal or equitable title, either being available to secure an entire unconditional and sole ownership, the provision referred to can, we think, have no force to defeat the plaintiff's recovery in this case.

Where articles of agreement are entered into for the sale of land, the purchaser is considered the owner. "It does not seem to be necessary to produce this effect, that any part of the purchase-money should be paid, it results from the contract. When a part of the purchase-money is paid, the interest of the purchaser in the land is not circumscribed by the extent of the money paid, but embraces the entire value of the land over and above the purchase-money due. He is treated as the owner of the whole estate, incumbered only by the purchase-money. If the land increases in value, it is his gain; if it decrease, if improvements are destroyed by fire, or otherwise, it is his loss." *Siter, James & Co.'s Appeal*, 26 Pa. 180. Where the vendor retains the legal title he has a lien for the unpaid purchase-money. *Zerby v. Zerby*, 9 W. 234; *Bradley v. O'Donnell*, 32 Pa. 279; *Zeigler's Appeal*, 69 Pa. 471; but he may use the legal title to compel payment thereof. *Thompson v. Carpenter*, 4 Pa. 132; *Woodward v. Tudor*, 81 Pa. 382; *Washabaugh v. Stauffer*, 81 Pa. 497. * * *

We are of the opinion, upon a full examination of this case in the light of all the authorities, that Seeley's title, under his contract, must be regarded as an equivalent to a fee simple; that the unpaid purchase-money must be treated as an incumbrance upon it; and that, in respect of the insurance, he must be considered the entire, unconditional, and sole owner. The previous decisions of this court will justify no other conclusion; and the cases in the other States, and the views of the text writers, we find to be in harmony with our own.

The judgment is affirmed.¹

¹ In *Clay Ins. Co. v. Huron Co.*, 31 Mich. 346, it was held that the vendor in a land contract was not the unconditional and sole owner contemplated by the policy, the vendee having gone into possession and paid the purchase price. In *Davis v. Furniture Co.*, 102 Wis. 394, the owner of an estate in fee upon condition subsequent, who was in possession, with no condition broken, and for whom there had also been deposited a deed in escrow, to be delivered upon the performance of the condition, was held to be the sole and unconditional owner within the meaning of the policy.

5. ALIENATION.

LOY *v.* HOME INSURANCE CO.

24 MINN. 315. — 1877.

CORNELL J. — The policy on which this action is brought contains the following among other conditions: "If the property be sold or transferred, or any change takes place in title or possession (except by reason of the death of the insured), whether by legal process or judicial decree, or voluntary transfer or conveyance, * * * this policy shall be void."

The property insured consisted of a dwelling-house, and certain furniture and wearing apparel therein contained, situate upon premises belonging to the respondent. After the issuance of the policy the respondent mortgaged the premises, and the same were sold under a power of sale, upon a foreclosure of the mortgage, by advertisement, pursuant to the statute. After the sale and before the period for redemption had expired, the loss occurred, the respondent still being in possession of the premises.

The question for consideration is whether this foreclosure sale was "a sale, transfer, or change in title," within the meaning of the foregoing condition, such as avoided the policy.

In construing a condition of this character, if, upon a consideration of the whole contract, it is uncertain whether the language of the stipulation is used in an enlarged or restricted sense, or if it is fairly open to two constructions, one of which will uphold and the other defeat the claim of the insured to the indemnity which it was his object in making the insurance to obtain, that should be adopted which is most favorable to the insured, and most in harmony with such, the main purpose of the contract on his part. The reasons for this are two-fold: the tendency of any such stipulation is to narrow the range and limit the force of the underwriter's principal obligation. It is also inserted by him for his own benefit and in language of his own choice. If any doubt arises as to its meaning, the fault is his in not making use of more definite terms in which to express it; hence the rule of strict construction against him, and the liberal one in favor of the assured, which prevail under such circumstances. *Hoffman v. Etna Ins. Co.*, 32 N. Y. 405; *Westfall v. Hudson River Ins. Co.*, 2 Duer, 495; *Ins. Co. v. Wright*, 1 Wall. 456; *West. Ins. Co. v. Crapper*, 32 Pa. St. 351.

Applying these principles, a correct interpretation of this condition of the policy would seem to be attended with but little difficulty. In the first place it makes a sale or transfer of the property a cause for avoiding the policy. Within the meaning of the stipulation this

refers to an absolute and completed, and not a conditional or incomplete, sale or transfer; in other words, a sale that wholly divests the owner of the property of all insurable interest therein.

The succeeding clause which gives a like effect to any "change in title, * * * whether by legal process, judicial decree, or voluntary transfer or conveyance," has reference to an absolute transfer of the legal title in one of these ways, though such transfer as in the case of a conveyance in trust, or by a deed, absolute in terms, but intended merely as a security, might not operate to divest the owner of the property of all his insurable interest therein.

In our judgment nothing short of a complete transfer of the legal title comes within the prohibition of this stipulation. The mere creation of a lien or incumbrance upon the property insured cannot be regarded as effecting "any change in title," either in the legal sense or according to the ordinary and popular understanding. "In legal acceptance," says Allen, J., in *S. F. & M. Ins. Co. v. Allen*, 43 N. Y. 389, "title has respect to that which is the subject of ownership, and is that which is the foundation of ownership; and with a change of title, the right of property, the ownership, passes." As applied to real estate, it is defined to be "the means whereby the owner of lands or other real property has the just and legal possession and enjoyment of it;" "the lawful cause or ground of possessing that which is ours." 2 Bouv. Law Dict. 986.

In this sense, which is also the ordinary and popular one in which the word is used, a "change in title" is a change in ownership, which carries the legal right of possession and property, and it is in this sense we must understand the word as having been used in this clause.

Although within the meaning of the registry laws a mortgage of real estate is defined to be a conveyance, yet under our laws it is not deemed a conveyance in the sense of passing any estate or interest in lands, or transferring any legal title thereto. The only interest which a mortgagee acquires is a lien upon the land in way of security, which, prior to the foreclosure of the right of redemption, is treated as personal property that goes to the administrator or executor, and not to the heirs. The legal title, with the right of possession, remains with the mortgagor until a completed foreclosure is had by sale, and the same becomes absolute by the expiration of the period for redemption. Until this time expires the purchaser at the sale has only a chattel and equitable interest. He has no legal title to the lands, nor any conveyable estate therein. The character of his interest is the same as that of a mortgagee before foreclosure sale. Gen. St., c. 52, § 11 Id., c. 75, § 11; *Donnelly*

v. *Simonton*, 7 Minn. 110 (167); *Horton v. Maffitt*, 14 Minn. 290 292

Neither is a foreclosure by advertisement "legal process" or a "judicial decree." The proceedings in this kind of a foreclosure are carried on wholly outside of court, and without the aid of its process or decree. It is obvious, then, that neither the giving of the mortgage nor the sale of the premises on foreclosure, the time for redemption not having expired, effected any change in title or possession in respect to the property insured, and did not, therefore, avoid the policy.

Order affirms l.¹

¹ In *Gibb v. Ins. Co.*, 59 Minn. 267, where the policy provided that it was to become void "if any change other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance," etc., it was held that the word "interest" is broader than the word "title," and includes both legal and equitable right, and that a contract in writing to convey the premises, the vendee having taken possession and paid part of the purchase price, effected a change of interest. But see *Arkansas Fire Ins. Co. v. Wilson*, 55 S. W. 933 (Ark.), where the policy provided that it was to become void "if the interest of the assured became other than the entire, unconditional, unincumbered and sole ownership," etc., and it was held that a contract in writing to convey the premises, under which the vendee had not taken possession did not avoid the policy; the word "interest" being construed in this clause as being synonymous with "title."

A provision in the policy against a change of interest or title of the insured property does not apply to a transfer by one partner to another of his interest in the insured partnership property. See *Phenix Ins. Co. v. Holcombe*, 57 Neb. 622, and cases there cited.

In *Walradt v. Ins. Co.*, 136 N. Y. 375, the policy was to be void in case of any change of interest, title, or possession, "whether by legal process or judgment or by voluntary act of the insured or otherwise," etc. It was held that a levy upon the insured stock of goods by the sheriff, under an execution, was not a change of interest or title within the meaning of the policy, and that although the sheriff took possession, yet the possession of the property was not changed within the meaning of the policy unless the occupancy of the place where the goods were was also changed so as to increase the risk. See also *Hammel v. Co.*, 54 Wis. 72.

"The title to property may be changed by a mortgage and foreclosure, but it is not either a vulgar or technical expression to speak of a change of title by the mere execution of a mortgage. In equity, and even at law, a mortgage is not regarded as a title to land. It is considered a lien, or incumbrance, which may transfer the title to the mortgagee; but the mortgagor is regarded as the owner until entry of the mortgagee or foreclosure. We may so readily imagine a great variety of forms of expression which would make a policy void, if the property should be mortgaged, that it may be fairly inferred, from the use of the phrase, 'when the title shall be changed,' that it was not designed to include a mere mortgage." — *Shepherd v. Ins. Co.*, 38 N. H. 232, 240.

6. INCUMBRANCES.

HICKS v. THE FARMERS' INSURANCE CO.

71 IA. 119. — 1887.

BECK, J. — The policy in suit contains a condition that it shall become void "if the property insured be sold, or any change take place in the title thereof, or if the property or any part thereof, hereafter in any manner whatever incumbered." The answer alleges that plaintiff, after the execution of the policy, and before the fire, incumbered the property insured by executing on his interest therein, which was one-third, a mortgage, etc., and that it was incumbered during the same time by a judgment against the plaintiff, which became and has remained a lien on the property. It is shown by the pleadings that the policy was issued to a firm of which the plaintiff is a partner, and that the policy, after the loss, was assigned to him. The plaintiff demurs to the answer, on the ground that the mortgage and judgment, having been executed and rendered while plaintiff was one of the partners to whom the policy was issued, do not constitute a breach of the condition of the policy. The property insured was an office building and furniture therein. The answer alleges that plaintiff held a one-third interest therein, and that it was encumbered by the mortgage and judgment. Surely, under these allegations, defendant would be permitted to show both a mortgage and judgment incumbrance upon plaintiff's interest in the property. And that the mortgage and judgment, as they are set out in the answer, would incumber plaintiff's interest in the property, there can be no doubt. The petition alleges that plaintiff owned one-third of the property, and that the mortgage was executed upon that interest, and the judgment was rendered while he owned it. That liens were created as against the realty is very plain. Their extent or the manner of their enforcement need not be a subject of inquiry.

The case, in our opinion, was rightly decided by the court below

Affirmed.¹

BALEY v. HOMESTEAD FIRE INSURANCE CO.

80 N. Y. 21. — 1880.

THIS action was brought upon a policy of fire insurance, issued by defendant to plaintiff upon his dwelling-house, barn, etc. The policy contained a condition that "this" company "shall not be

¹ Accord, as to judgment being an incumbrance, *Bowman v. Ins. Co.*, 40 Md. 620.

liable * * * if without written consent hereon the property shall hereafter become incumbered in any way."

ANDREWS, J. — We are of opinion that the condition in the policy, that the company shall not be liable "if without the consent of the company written on the policy, the property (insured) shall hereafter become incumbered in any way," is to be construed as referring to incumbrances created by the act of the insured, and has no application to incumbrances by judgment, or otherwise *in invitum*, created by operation of law. We think the condition has the same meaning as if it had provided that the policy should be void if the assured should in any way incumber the property without the written consent of the company. The language used implies that the consent of the company which will prevent the avoidance of the policy, is to precede the creation of the incumbrance. This condition of things has no proper application to the case of judgments which may be obtained by third persons against the insured, but only to incumbrances created by his voluntary act. The provision for consent was not intended primarily to relieve the insured from a forfeiture incurred, but to prevent the incurring of a forfeiture. It is not reasonable to suppose that the parties intended to provide for the consent of the company in advance to the rendition of a judgment against the insured in favor of third persons. If the condition embraces incumbrances by judgment, then in case of an insurance upon real property the moment a judgment is rendered, and the lien attaches to the insured property, a forfeiture occurs, and the contract of insurance is at an end, unless the company consents to re-instate it, by waiving the forfeiture, and this too, although the land cannot be sold on the judgment until an execution against personal property is returned unsatisfied. If incumbrances created by operation of law, are within the condition, the imposition of a tax on the insured property would create a forfeiture of the insurance, and the result would be that each year on the tax-rolls being completed, and put into the hands of the proper officers, for the collection of the taxes imposed, the insurances of the company on real property would be *ipso facto* terminated, taxes being an incumbrance on the land taxed (*Barlow v. St. Nicholas Nat. Bank*, 63 N. Y. 399), and all land not specially exempted being liable to taxation. A construction tending to such consequences must be rejected as not within the intention of the parties, if another construction is possible. The condition ought to be construed in the same manner as conditions in leases against assignments, and it is well settled that an assignment by operation of law is not a breach of such condition. 4 Kent, 124.

The language of the condition in question, fairly interpreted, does not extend to incumbrances created by law. To so construe it would defeat the contract of insurance in cases which could not have been contemplated. The defendant is claiming a forfeiture. When a clause in a contract is capable of two constructions, one of which will support, and the other defeat the principal obligation, the former will be preferred. Forfeitures are not favored, and the party claiming a forfeiture will not be permitted, upon equivocal or doubtful clauses, or words, contained in his own contract, to deprive the other party of the benefit of the right or indemnity for which he contracted. In *Egan v. Mutual Ins. Co.*, 5 Denio, 326, the condition was to the effect that the policy should be void if the insured should suffer any judgment, etc., unless he notified the company thereof, in which case, the power was reserved by the company to assent thereto, or to cancel the policy. This was a reasonable provision, and a defense founded thereon was sustained by the court, but the case has no bearing upon the one now before us.

The judgment should be affirmed.

All concur.

Judgment affirmed.¹

STATE INSURANCE CO. v. SCHRECK.

27 FEB. 527. — 1889.

REESE, Ch. J. — Among the defenses presented by the answer was one that defendant in error had by mortgages incumbered the property insured in violation of the condition of the policy. This condition was as follows: "Any other insurance or any incumbrance upon any of the property hereby insured existing at the date of this policy not made known in the application, or if any subsequent incumbrance is imposed, or title or occupancy changed or hazard increased without the written consent of the secretary of the company, or if the building becomes vacant, this policy shall be void." * * *

¹ In *Penn. Ins. Co. v. Schmitt*, 119 Pa. St. 449, it was held that a judgment entered upon a warrant of attorney was an incumbrance.

MECHANIC'S LIEN In *Green v. Ins. Co.*, 82 N. Y. 517, it was held that a mechanic's lien, not filed by the procurement of the insured, was not an incumbrance within the provision of the policy. — *Contra, Smith v. Ins. Co.*, 106 Ia. 225.

It was shown by defendant in error upon the witness stand on cross-examination, that some of the personal property which had been destroyed had at some time or other subsequent to the execution of the policy had been mortgaged, but that at the time of the fire the mortgages had all been paid and there was no incumbrance upon the property. It is now contended by plaintiff in error that the fact of the execution of the mortgage referred to avoided the policy as to the personal property. The term of the policy was five years from the date of its execution, which was the 8th day of September, 1884. An examination of the language hereinbefore copied satisfies us that it was not the intention of the parties to the contract to require that the same personal property should remain upon the farm for the whole term of the policy, but that, as hereinbefore indicated, it was upon certain kinds of property upon the premises. The second item in the list given is "On beds and bedding while therein, \$50;" the third, "On wearing apparel while therein, \$100." It cannot be contended that it was the purpose of the parties to the contract that the same beds and bedding and wearing apparel should necessarily remain in that building for five years to secure the benefit of the insurance, but rather that beds and bedding and wearing apparel while in the building, without reference to any particular kind or quality, should receive the benefit of the insurance. The same may be said as to the household furniture, the sewing machine, the hay in the buildings or stack, the harness on the farm, wagon, farming utensils, and live stock. The clear intent and purpose of the parties was that such as might be worn out and destroyed might be replaced; that such as it might become necessary to sell might be sold and other stock purchased in its stead. The execution of a chattel mortgage is a sale subject to the conditions named in the mortgage. The legal title is vested in the mortgagee, and it is his property subject alone to the conditions contained in the mortgage. Had the property destroyed been sold, and the legal title transferred to the purchaser, defendant in error could recover nothing for his loss. Had it been mortgaged and the legal title so transferred, he could still recover nothing. But, under the plain sense of the policy, had the property been replaced by other of the same kind and species, there could be no doubt of plaintiff's liability in case of loss. Had the contract of insurance been upon specific personal property, it is possible that the defense presented would have been available. However, that question is not before us. But we are quite clear that the transfer of the legal title to the insured property, either by mortgage or sale, would avoid the policy so far only as that particular property was concerned, during the time of the existence of the

title in the purchaser or mortgagee, and to that extent only could the sale or mortgaging of the property under the provision of this policy be a successful defense. * * *

7. PROHIBITED ARTICLES.

WHEELER v. TRADERS' INSURANCE CO.

62 N. H. 450. — 1883.

ASSUMPSIT, on a policy of insurance on the plaintiff's woollen mill and contents.

The plaintiff, for the purpose of killing moths in some wool, carried into the mill a barrel of naphtha, drew some of the liquid several times into a watering-pot holding about two quarts, and sprinkled it upon the wool at the opposite end of the room from the cask. The fire broke out about thirty feet from the wool, and spread rapidly to it. Nothing more is known of the origin of the fire. The plaintiff bought the naphtha (supposing it to be benzine, which he had ordered) for the use of destroying the moths, and he intended to remove it from the building after sprinkling the wool, and use it in cleaning the windows, which were to be taken out of the mill for that purpose.

ALLEN, J. — The stipulation in the policy, that "if the assured shall keep or use * * * petroleum naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid or chemical oils without written permission in this policy, then and in every such case this policy is void, and all insurance thereunder shall immediately cease and determine," was a

¹ *Contra*: In *German Amer. Ins. Co. v. Humphrey*, 62 Ark. 348, there was a provision in the policy against incumbrances by chattel mortgage. The insured property (hotel furniture) was mortgaged, but before the fire, the mortgage had been paid. The court said: "If it be said that, where the mortgage is paid off, there is no longer an incumbrance and increase of risk, still as to whether or not the mortgage had been paid off would be the question, and one that often could not be settled without expensive litigation. The insured mortgagor might enter into collusion with the mortgagee to defraud the insurance company after the loss occurred by claiming that the mortgage had been paid off and discharged, when in fact it had not. Unfortunately, all men are not honest. Without some such provision in the policy, the unscrupulous would have an inviting opportunity, after a loss, to divide the spoils, at the expense of the insurer. Doubtless some such considerations as these prompted the clause in the policy under consideration. The clause is reasonable and clear and the parties had the right to thus contract."

part of the contract of insurance entered into by the plaintiff with the defendants, without any apparent mistake, deception or fraud. The plaintiff expressly agreed that a violation of the condition should, of itself, be a forfeiture of all insurance under the policy. Having voluntarily entered into the contract thus restricted, the plaintiff cannot reasonably complain of the enforcement of the forfeiture for a violation of the condition. *Mead v. N. W. Ins. Co.*, 7 N. Y. 530; *Lee v. Howard Ins. Co.*, 3 Gray, 583; *Kelley v. Home Ins. Co.*, 97 Mass. 288. There is no ambiguity in the meaning of the words used, or the sense in which they were employed, by which the plaintiff might have the benefit of a doubt. *Smith v. Ins. Co.*, 32 N. Y. 399. The contract must be interpreted and the terms used must be defined in the light of the mischief intended to be avoided by the restriction. The prohibition of the keeping or use for any purpose, or for any measurable time, of an article so inviting to fire as that described in the case, was a reasonable prohibition, the violation of which, in any degree and for any time, would expose the insured premises to an extreme degree of danger; and to give the restrictive clause in the policy a construction which would permit the introduction into the premises of naphtha or benzine, and its use there for any dangerous purpose for any time, would be a practical nullification of that part of the contract. If it could be said that merely "keeping" it, not for sale, nor for any general use in the business of manufacturing, but for temporary storage, could not be within the prohibition intended by the parties to the contract, certainly the "use" made of it was one subject to the prohibition of the use of an article hazardous to an extraordinary degree, if the use of any combustible material ever could be. The cases in which a disregard of the prohibition of keeping or using extraordinarily hazardous articles has not been held to work a forfeiture of the policy are those where the use made was one incident to the business of the insured, adopted from necessity or custom, and recognized by the insurer, so that a waiver of the prohibitory clause followed. Such cases are, — *Carlin v. Assurance Co.*, 57 Md. 515, in which the prohibited oil was, at the time of the insurance, known by the insurers to be commonly used by the insured to lubricate machinery; *Buchanan v. Ins. Co.*, 61 N. Y. 26, where the oil was known to be commonly used for illuminating purposes; and *Whitmarsh v. Ins. Co.*, 16 Gray, 359, in which the inhibited article was known to be usually kept and dealt with as a part of the stock of goods in a country store insured. The use by the plaintiff of the benzine or naphtha did not come within the doctrine of any of these cases, nor was it a use in a small quantity as a medicine, or for

other special and not dangerous purpose, as in *Williams v. Ins. Co.*, 54 N. Y. 569.

The plaintiff claims that the policy was not forfeited by the use of the naphtha, because the use was not habitual, but temporary, and confined to a single occasion. The cases relied on as authority for this position are cases, for the most part, where there was no express stipulation or warranty against the use of the particular dangerous article or material in question, but only a prohibition in general terms of keeping hazardous things on the premises or of carrying on a different or more dangerous trade. *Dobson v. Sotheby, M. & M.* 90; *Shaw v. Robberds*, 6 A. & E. 76. But where there is a stipulation that the policy shall be avoided on the use of an article expressly named, and there is nothing in the policy from which a permission to use the article, in a partial, limited or temporary way, can be inferred, full effect has usually been given to the prohibitive clause by a forfeiture of the policy for its violation. *Glen v. Lewis*, 8 Exch. 607; *Faulkner v. Central Ins. Co.*, 1 Kerr, N. B. 279; *Worcester v. Ins. Co.*, 9 Gray, 27; *Matson v. Ins. Co.*, 73 N. Y. 310; *Birmingham Ins. Co. v. Kroegeher*, 83 Pa. St. 64; *Cerf v. Home Ins. Co.*, 44 Cal. 320. No reason has been suggested by the plaintiff why the restrictive clause in the policy of insurance in this case should receive a construction by rules different from those applied to ordinary business contracts. The terms of the prohibitive clause are simple, well known, and in common use. There is nothing ambiguous about them, and there can be no doubt as to their meaning. The stipulation was a plain, unqualified agreement that the policy should be forfeited if naphtha were used in the premises insured. It was a reasonable restriction against the use of a very dangerous and combustible material; and a construction which would uphold the policy, in spite of a plainly hazardous use of any substantial quantity of so dangerous a fluid on the premises, for any substantial time, would defeat the object for which the restriction was made.

CARPENTER, J., did not sit; the others concurred.

Motion denied.¹

¹ In *First Cong. Church v. Ins. Co.*, 158 Mass. 475, the policy provided that it should become void if "naphtha * * * be kept or used by the insured on the premises insured." A painter who had contracted to paint the church, used a naphtha torch to burn off the old paint. It was held that there is an implied exception to this provision of the policy, if what is done is in making ordinary repairs by the use of such means as are reasonably necessary for that purpose. This was the question for the jury: "Was such a use of naphtha a reasonably safe and proper way of making repairs in this building, under the circumstances?" See also *Steinbach v. Ins. Co.*, 54 N. Y. 90, and *Steinbach v. Ins. Co.*, 13 Wall. 183.

8. OCCUPANCY.

HERRMAN *v.* ADRIATIC FIRE INSURANCE CO.

85 N. Y. 162. — 1881.

THIS action was upon a policy of fire insurance. The policy contained this condition: "If the above-mentioned premises shall * * * become vacant or unoccupied, and so remain for more than thirty days, without notice to and consent of this company in writing, * * * this policy shall be void."

The premises upon which was the property insured constituted the plaintiff's farm and summer residence. The farm was managed by a farmer in plaintiff's employ, who received, as a part of his compensation, the use of the smaller dwelling mentioned in the policy, and who, with his wife and children and a gardener, lived upon it throughout the entire year. The plaintiff, with his wife and children, actually lived upon it during the summer and part of the fall, only. About the 20th of November, 1876, the plaintiff with his family left the premises and returned to his city residence to remain for the winter, leaving in the main dwelling mentioned in the policy all his furniture, and the summer clothing of himself and family. All the premises insured and the property remaining therein were left in charge of the farmer. It was the duty of the farmer to see that the main dwelling, which could be seen from the farm-house, was well ventilated and properly watched, and he or some member of his family, regularly once a week, did go into and through it, and open all the windows for the purpose of ventilation. The house was then carefully closed again, the windows bolted on the inside and firmly secured, and the outer door locked, and thus secured, the house was left for the ensuing week. The plaintiff, generally, in company with his wife, visited the premises once a fortnight, to see that the farmer took good care of them. The plaintiff was in the habit on these visits of opening the main dwelling, going through the rooms and lunching therein, but neither he nor his wife, nor any other member of his family passed a night in the house during the winter preceding the fire. About three days before the fire the plaintiff and his wife were there, on one of these usual visits. On the 8th of April, 1877, a fire occurred by which the main building, with its furniture, and the wash-house, kitchen and privy in the rear were destroyed, the loss exceeding the amount of the insurance.

FOLGER, Ch. J. — This is an action on a policy of fire insurance. The property insured consisted of different buildings, and different

kinds of chattel property kept in those buildings, respectively. The different properties insured, and the different amounts put at risk, each are specifically named in the policy with much minuteness. The property destroyed and for the loss of which the action is brought was but parts of the whole at risk, being the dwelling-house, and most of the contents of it, and four outbuildings, essential or convenient for use with the dwelling.

The question in agitation at the Trial Term and at the General Term was, whether the policy was avoided by a breach of the condition, that if the premises should become vacant or unoccupied, and so remain for more than thirty days without notice to, and consent of, the defendant, in writing, the policy should be void. The plaintiff contends that the two words "vacant" and "unoccupied" are synonyms, and are to be interpreted as having the same meaning, and that the meaning is empty. And then argues that, as the dwelling-house was not empty, there was no breach of the condition. There are doubtless conditions of a dwelling-house, or other like structure, when either word applied to it, or both words applied to it, will express a like state of it. There are however, states of it when that will not be the case. It is so, because the different things that are receptive of the epithets of vacant and unoccupied are different in their capability and susceptibility of being filled or occupied. Some cannot have one of those terms applicable to them, without the other at the same time being also applicable. Some, from the nature of the use which goes with the occupation of them, may not be vacant, and yet they will, in any just use of the term as applicable to them, be unoccupied. A dwelling-house is chiefly designed for the abode of mankind. For the comfort of the dwellers in it, many kinds of chattel property are gathered in it. So that, in the use of it, it is a place of deposit of things inanimate and a place of resort and tarrying of beings animate. With those animate far away from it, but with those inanimate still in it, it would not be vacant, for it would not be empty and void. And as a possible case, with all inanimate things taken out, but with those animate still remaining in it, it would not be unoccupied for it would still be used for shelter and repose. And it is because, in our experience for the purpose and use of a dwelling-house, we have come to associate our notion of the occupation of it with the habitual presence and continued abode of human beings within it, that that word applied to a dwelling always raises that conception in the mind. Sometimes, indeed, the use of the word "vacant," as applied to a dwelling, carries the notion that there is no dweller therein; and we should not be sure always to

get or convey the idea of an empty house, by the words "vacant dwelling" applied to it. But when the phrase "vacant or unoccupied" is applied to a dwelling-house, plainly there is a purpose — an attempt to give a different statement of the condition thereof; by the first word, as an empty house, by the second word as one in which there is not habitually the presence of human beings. In the case of *Herrman v. The Merchants' Insurance Company*, 81 N. Y. 184 in this court, in June last, the decision went, not on the ground that the two words were used to mean, or that they meant, the same condition of the building, but that, by the use of the copulative conjunction with them, there was a contract framed of which there was no breach, unless the house was at the same time in the double state expressed by the phrase; that is, both vacant and unoccupied at the time of the fire, both empty and unused for abode.

It is clear, from the testimony, that the dwelling-house insured by the defendant was not occupied as such at the time of the fire. The fortnightly visits of the plaintiff and his wife to it were not the occupation that is meant when a dwelling-house is spoken of. The weekly tours of inspection of the farmer and members of his family living on the grounds, and his supervision of it from his own house, were more useful, but they fell short of being occupation of it. The term "unoccupied," used in the policy, is entitled to a sense adapted to the occasion of its use, and the subject-matter to which it is applied. It does not need that we go into discussion of the good reasons for exacting the condition on taking a risk upon a dwelling-house. It is enough that the parties have come into that covenant. It is to have a meaning fitted to the circumstances in which it was made and to the subject to which it related. We have already said enough to show our opinion that, for a dwelling-house to be in a state of occupation, there must be in it the presence of human beings as at their customary place of abode, not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage. We think that a verdict of a jury would not have been allowed to stand, that found that this dwelling-house was occupied at the time of the fire, within the terms of the policy. But it is said, that though this may be so in general, yet that the defendant made its contract with a view to just the state of things that existed with this property; that it was chargeable with a knowledge of the character and use of the premises, and that there would be a change of occupancy, such as in fact occurred. We cannot yield to that view. It may be that the defendant knew that it was but the place of summer abode for the plaintiff. Its

contract was issued in the summer when the property was in strict occupancy, and it provided for the coming of the fall, when that occupancy would be abandoned or modified; for the policy was not void at once on a cessation of occupancy. That cessation must last for thirty days, and be unnotified to the the defendants and continue thereafter without his consent. There was opportunity for the plaintiff to keep up that indemnity or to get other; and to the defendant to retain the risk, or to be freed from it, when that occupancy was about to cease, and notice was given.

Nor are we able, after much consideration, to agree with the learned General Term on the ground upon which it put its judgment. The condition of the policy is: "Or if the above-mentioned premises shall * * * become vacant or unoccupied * * * this policy shall be void." As we have above said, there were several different kinds and pieces of property insured, and, as was indicated by the description of them, the whole making up a well-to-do proprietor's rural establishment. The understanding must have been that there was comprised in the whole the buildings on a farm or country seat and the chattel property usually kept at such a place. The contention is that the words "above-mentioned premises" are collective and apply to all the property described, and the intent of the condition is that if all of it should be left unoccupied, then the policy would be void; but that one or several, or many of the buildings might be unoccupied, yet, if the rest were occupied, the condition of the policy would be saved. To give this construction to the phrase in question, it would need to carry it through all the conditions in the policy, to manifest absurdity and to an inconvenient precedent. There is a condition against other insurance, "on the property hereby insured." If the plaintiff had over-insured his dwelling-house, would not the condition have been broken, as to that, though he had not increased that on his kitchen detached? There is a condition against a change of title of the property. If the plaintiff had sold off so many acres as would include the farmhouse, would he have retained his insurance on that building because he had not transferred the whole premises? The plaintiff grasps at a two-edged sword, when he seeks to make such application of those general words of the policy. He contends that when words are used in the policy referring back to the property described, they mean to include the whole property. This would be to make the contract of insurance entire and indivisible; and to affect all the property insured with any act of the insured, which, as to any item thereof, worked a breach of any condition. This is not the true, just, or equitable construction. The clause is not to be used dis-

tributively, and to be applied to each singular of the previous description of the property, as the kind of that property and the nature of the use of it may demand. It was upon this principle that we grounded our decision in *Merrill v. Agr. Ins. Co.*, 73 N. Y. 452.

There we said: "Though there may have been some conduct of the insured as to some of the property, not evil in itself, but working a breach of the condition in its letter, the effect of that breach may be confined to the insurance upon that property, the contract as to that be held to be avoided, and as to the other subjects held valid." This was the converse of the proposition that we are now maintaining.

The case of *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605, is not parallel with this.

Therefore, though the farm premises and some of the buildings thereon were in actual human occupation, that use of them did not extend to and take in the dwellings burned, so as to keep good the condition of the policy. It is further claimed that it was erroneous for the trial court to direct a verdict for the defendant, because all the property burned was not unoccupied. Besides, the dwelling-house, there was lost a wash-house, a wood-house, a kitchen and a privy. It is contended that there was no evidence that these were unoccupied. The reasoning is ingenious, but it is not convincing. It is said that it does not appear that the occupation of these structures was confined to the plaintiff or the members of his immediate family as it was made up when he dwelt upon the place, and that it might be that the farmer and the members of his family might have used and occupied them. Now, these out-buildings were appurtenant to the dwelling-house; the use of them was concurrent with the use of the dwelling-house; they were parts of the one domestic establishment, and separate but forty feet from the main building. It is too plain for denial, save as a *dernier resort*, that the occupancy of them, in habitual continuous use for the purposes for which they were built and to which they were put, began when that of the dwelling-house began, and ended when that ended. The plaintiff and the defendant made their contract in such terms as it pleased them both. It may or may not be a strict and rigorous application to the facts of the case of the condition that we have been considering; but we cannot, consistently with lasting principles of construction and interpretation, hold otherwise than that the plaintiff made a breach of a binding condition, and must abide the unfortunate consequence.

The order of the General Term should be reversed, and judgment

absolute rendered in favor of the defendant upon the verdict, with costs.

All concur, except MILLER, J., not voting.

Order reversed and judgment accordingly.¹

9. LOCATION OF PROPERTY.

BRADBURY v. FIRE INSURANCE ASSOCIATION.

80 ME 396. — 1888.

LIBBEY, J.— These actions are on fire policies, and being substantially alike were tried together and come to this court in one report. The first four policies insure a certain sum on the plaintiff's " frame stable building, occupied by assured as a hack, livery and boarding stable, situated on the north side of Court street, Auburn, Maine," and " five hundred dollars on his carriages, sleighs, hacks, hearses, harnesses, blankets, robes and whips contained therein." The fifth does not insure the building, but insures fifteen hundred dollars on the same kinds of personal property " stored in the private frame stable occupied by assured and situated near east side of Main street, Auburn, Maine." The loss claimed by the plaintiff is for damage by fire to a hack not in his stable named in the policies at the time of the damage, but in a repair shop of one Litchfield, on another street about one-eighth of a mile distant, where it had been removed the day before the fire without the knowledge or consent of the defendant, and it is admitted that the board rate for insurance on Litchfield's repair shop and contents was one per cent. more than on the plaintiff's stable on Court street. The damage to the hack by fire while at Litchfield's shop is admitted, and no question is made as to the sufficiency of the notices. The only contention between the parties is, whether the insurance attached to and followed the plaintiff's carriages, hacks, etc., when removed from his stable to another place for repairs or some other temporary purpose,

¹ See also *Shackelton v. Sun Fire Office*, 55 Mich. 288; and for a comprehensive review of the cases, *Continental Ins. Co. v. Kyle*, 124 Ind. 132.

"A fair and reasonable construction of the language ' vacant and unoccupied,' is, that it should be without an occupant, — without any person living in it." — *Amer. Ins. Co. v. Padfield*, 78 Ill. 167.

A policy rendered void by a violation of the condition as to non-occupancy is not revived by a subsequent occupation of the building. — *Moore v. Ins. Co.*, 52 N. H. 240; though *contra*, where the policy reads " vacant or unoccupied, and so remain." — *Laselle v. Ins. Co.*, 43 N. J. L. 468.

or was limited to such carriages only as were at or in the stable named at time of loss or damage.

Upon this question there appears some conflict among the authorities. The general rule stated by text writers and held by the general current of decided cases is, that place where the personal property insured is kept is of the essence of the contract, as by that the character of the risk is largely determined, and the property is covered by the policy only while in the place described. Wood on Ins. p. 110; Blodgett on Fire Ins. p. 22; *Eddy Street Iron Foundry v. The Hampden S. & M. F. Ins. Co.*, 1 Cliff. 300; *Annapolis & Eldridge R. R. Co. v. Baltimore Ins. Co.*, 43 Md. 506; *Fitchburg R. R. Co. v. Charleston M. F. Ins. Co.*, 7 Gray, 64. The following cases are cited as establishing an exception to the general rule and as sustaining the plaintiff's contention. *Everett v. Continental Ins. Co.*, 21 Minn. 76; *Holbrook v. St. Paul F. & M. Ins. Co.*, 25 Minn. 229; *McClure v. Girard Ins. Co.*, 43 Iowa, 349; *Longueville v. Western Ins. Co.*, 51 Iowa, 553; *Lyons v. Providence Washington Ins. Co.*, 13 R. I. 347. We think a careful examination of all these cases will show that the chattels insured are so described in the policy that they can be identified without reference to the building or place where they were kept, and the courts held that the words "contained in" a certain building, or kept in a certain building or place, was a part only of the description of the chattel, and if from its nature, character or ordinary use, the parties must have understood that it was to be out of the building or place a part of the time in ordinary use, the policy should be held to cover it while so out. This is going to the verge in construing the language used by the parties in a contract, when, ordinarily, it does not bear such meaning. But this case does not appear to us to be within the authority of those cases.

The policies in suit do not insure a particular carriage or hack by any description by which it can be identified without reference to the stable. They do not insure all the plaintiff's carriages, hacks, etc., used in his livery business, contained in the stable described. It cannot be held that they cover only such carriages, hacks, etc., as were contained in the building named at the date of the policies. From the nature of the plaintiff's business, it must have been in the contemplation of the parties that the chattels named might be changed from time to time during the year, some sold, some worn out, some destroyed by accident, and others put in to take their places. The policies are similar to an insurance of a shop-keeper on his stock of goods in his shop, or of a railroad company on its rolling stock on its road, constantly changing. In such case the property insured can be ascertained only from the place of business

named. *Lyons v. Providence Washington Ins. Co.*, 13 R. I. 347; *Eddy Street Iron Foundry v. Hampden S. & M. F. Ins. Co.*, 1 Cliff. 300; *Ring v. Phoenix Assurance Co.*, Mass. N. E. R. V. 5, No. 14, p. 387. The policies insure such of the plaintiff's carriages, hacks, etc., as are contained in his stable at the time of loss. We can see no other way of identifying the property covered by the policies. It cannot be that the policies should be so construed that they will cover a hack once put into the stable and then taken out, wherever it may be. The language of the contract is not apt to embrace such a risk. The risk might thus be increased two or three-fold, and still if the contract must be construed as covering it, it is not a forfeiture of the policy for an increase of the risk. It is simply the risk contemplated by the parties. *Fitchburg R. R. Co. v. Charleston M. F. Ins. Co.*, 7 Gray, p. 66. The view we take of the first four policies makes it unnecessary to consider whether the terms of the fifth policy should receive a construction more strongly against the plaintiff. They are certainly no more favorable to him.

The actions are not sustained.

Judgment for the defendants in each action.

PETERS, C. J., WALTON, VIRGIN, FOSTER and HASKELL, JJ., concurred.¹

10. OPERATION OF MANUFACTORY.

LEBANON MUTUAL INSURANCE CO. *v.* LEATHERS.

8 ATL. REP. 424 (PA.) — 1887.

THE policy provided: "If the property insured be a manufacturing establishment or a mill running in whole or in part over or extra time, or running at night, or if the same shall cease to be operated without the consent of the company indorsed hereon, this policy

¹ In *Noyes v. Ins. Co.*, 64 Wis. 415, a sealskin dolman insured as wearing apparel "contained in" a certain dwelling-house, was burned while at a furrier's for repairs. The court held that considering the character of the property the policy must be deemed to have contemplated such a change of location as permissible, the court saying, however, that "in a policy upon personal property, which from its character and ordinary use, is kept continuously in one place, as a stock of merchandise, machinery in a building, household furniture, or goods stored, the rule undoubtedly is that the location of the property designated in the risk is an essential element of the risk and usually a continuing warranty." In *Amer. Cent. Ins. Co. v. Rothchild*, 82 Ill. 16, 168, it is held that "insurance upon a stock of goods which was to be sold and replenished, covers as well the additions made from time to time, after the insurance was effected, as those on hand when the policy was issued."

shall cease and determine." During part of the summer of 1883, and some time prior to the fire, defendants in error did not do any tanning in the shops connected with the property insured because they had run out of hides. They negotiated with a number of persons for hides and stocks; had ordered hides, but the orders were not yet filled when the fire occurred. The property, however, during all this time, was occupied and used as a tannery. Bark was purchased, prepared, and placed into the sheds, in addition to the bark that remained over from the previous year. The liquors were kept in the vats ready for use whenever hides could be secured. The machinery and tools all remained on the premises, and at no time during the life of the policy was the property vacant, nor did it cease to be kept and operated as a tannery.

PER CURIAM. — A mere temporary suspension of the business of the establishment for the purpose of repairing, or from want of a supply of materials, is clearly not ceasing to operate the establishment within the meaning of the policy. * * *

II. ALTERATIONS.

MACK *v.* ROCHESTER GERMAN INSURANCE CO.

106 N. Y. 560. — 1887.

RUGER, Ch. J. — The policy of insurance upon which this action was brought contained, among others, the following provisions: "The working of carpenters, roofers, gas-fitters, plumbers and other mechanics, in building, altering or repairing any building or buildings covered by this policy will cause a forfeiture of all claim under this policy, without the written consent of this company indorsed hereon." It was also provided that the policy should be void "if the risk be increased by any means within the control of the assured."

At the Circuit a verdict was directed in favor of the defendant, upon the ground that the loss occurred during the violation of the conditions of the policy by the plaintiff, and while the building was being occupied by carpenters in making alterations therein without

¹ So, too, where the operation of a cotton mill was temporarily suspended because of difficulty in procuring cotton of the quality that could be worked up at a profit. *Amer. Fire Ins. Co. v. Manuf'g. Co.*, 125 Ill. 131. And likewise where there was a temporary cessation of the operation of the machinery in a saw-mill during the illness of the sawyer, the other business of the mill being conducted as usual. — *Ladd v. Ins. Co.*, 147 N. Y. 478.

the defendant's written consent. The General Term was of the opinion that the evidence presented a question of fact for the jury, and that the trial court erred in directing a verdict. We differ with the General Term. There was no material conflict in the evidence, and the following facts were undisputed: The policy in question was issued January 29, 1881, and the fire occasioning the destruction of the building took place on October eleventh, thereafter. At the time of the insurance the building was occupied as a grocery store by a tenant of the plaintiff, and continued to be so occupied until about October first. On September 29, 1881, the plaintiff executed a lease of the building to other tenants, who contemplated using it for the purpose of carrying on the business of drying fruit, and the lease provided that they should have the privilege of putting the machinery needed for their business into the building. This business required some alteration in the structure, and the introduction therein of a furnace and wooden shafts or boxes running from the cellar to the roof, and constituting the driers in which fruit was intended to be cured by heat. These driers required, in their formation, the cutting of large holes, five feet square, through each floor of the building and its roof, and the removal of the timbers, boards, scantling and plastering, constituting the flooring and roofing, and the rebracing of the joists or sleepers of the several floors. They also required the introduction of wooden boxes or shafts running from the cellar to six feet above the roof, divided into compartments, for holding the fruit while it was in process of being dried. These boxes were made of boards securely fastened to pine scantling at each corner of the box and forming a well or shaft from cellar to roof. From about October first to the time of the fire, carpenters were engaged in making these changes as well as making tables and other conveniences for carrying on the business of drying fruit, and these improvements had not been completed when the building was destroyed. The General Term assumed that the making of ordinary and necessary repairs to a building to preserve it from decay, or the cutting of a stove-pipe hole in a partition, or other similar acts, would not be a breach of the condition of the policy, and, therefore, the question here presented could not be held as a question of law to constitute such an alteration of the building by carpenters as would violate the conditions of the policy. These illustrations do not seem to us to be applicable to this case, or to afford any authority for the proposition that a jury were authorized, in such case as the present, to find that the covenants were not violated by the plaintiff. The General Term properly laid down the rule by which such instruments should be construed, and

held that they should receive a reasonable construction, reference being had to the object sought to be obtained by the parties.¹ It was also said that "such conditions are not to be extended by implication so as to include cases not clearly or reasonably within the words as ordinarily used and understood." We have no difficulty in agreeing with the rules of law laid down by that court, but we are quite unable to concur in the view taken by it of the evidence. * * * There can be no reasonable question but that the evidence here showed a clear and deliberate attempt to change the character of the occupation of the insured building from a comparatively safe to a hazardous one, and a substantial alteration of the structure by carpenters. These alterations required the removal of large portions of two floors and the roof, and the introduction therein of two flues constructed of inflammable materials and extending through the entire height of the structure, affording every means for the spread of conflagration and constituting a large increase of combustible material. The case is brought clearly within the spirit as well as the letter of the contract, and if it does not show a violation of the conditions, we can conceive of no situation which would have effected that result. In case there had been a submission of the facts to the jury and it had found that carpenters were not engaged in making alterations of this building within the meaning of the policy, it would have been the clear duty of the court to have set aside the verdict. Courts are under no obligation to yield their assent to verdicts which deny significance to language, or violate the plain meaning and intent of an unambiguous contract.

The order of the General Term should be reversed and the judgment entered upon the verdict affirmed, with costs.

All concur.

Order reversed and judgment affirmed.²

¹ The General Term said (35 Hun, 78): "It has been held that a similar clause in a policy did not apply to ordinary or necessary repairs, because they are presumed to be assented to by implication, and it would not be reasonable to construe the provisions so as to make a contract to indemnify the building from fire, provide for its destruction by other elements. (*Franklin Ins. Co. v. Chicago Ice Co.*, 36 Md. 102.)"

² "When a building is insured it is of course understood that it is to be used in the ordinary way of using similar buildings and no one expects that it is to be set apart and wholly devoted to being kept safely. One of the ordinary incidents to this usual occupation is that of making repairs. The general right to make these has never been doubted, when the policy contained no special provisions upon the subject." — *Townsend v. Co.*, 18 N. Y. 168, 174. See also *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452.

12. STRUCTURE ON GROUND NOT OWNED BY INSURED.

DOWD *v.* AMERICAN FIRE INSURANCE CO.

41 HUN. 139. — 1886.

APPEAL from judgment in favor of plaintiff in an action brought upon an insurance policy. The policy provided. "If the building insured stands on leased ground it must be so represented to the company and expressed in the policy in writing, otherwise the insurance as to such property shall be void."

PECKHAM, J. — It seems to me plainly proved that the building which was insured under the policy, put in evidence in this case, stood on leased ground, and it was not so represented to the company nor expressed in the policy in writing, and the policy contained a provision that otherwise the insurance as to such property should be void. The instrument, under which the plaintiffs' title accrued, stated that John House, who was the original owner of the land demised, leased and to farm let unto the assignor of the plaintiffs' the land upon which the building in question was erected, and to his heirs and assignees forever and provided for perpetual payment of an annual rent, with a clause of re-entry for condition broken. It was proved that at the time when the policy was executed the rent had been in arrears for a number of years. The ground was leased within the meaning of the language used in the policy. *Tyler v. Heidorn*, 46 Barb. 439; *Van Rensselaer v. Barringer*, 39 N. Y. 1, at 18. The first cited case shows the view taken by the General Term in this department, of the character of those instruments which reserved rent, even when in the language used they were, in terms, conveyances in fee, subject to the payment of rent; the court saying that the parties to the instrument were landlord and tenant, even when the language was as above stated. The language in the instrument in question is technically that which is used in leases, "demise, lease and to farm let," "yielding and paying therefor" * * * "the annual rent," etc. I think it must be held that it was proved the building stood on leased ground. * * *

13. FORECLOSURE PROCEEDINGS.

EARL, J., IN TITUS *v.* GLENS FALLS INSURANCE CO.

51 N. Y. 410, 417. — 1880.

I now come to a more serious objection to this recovery. The policy contains a provision that it should be void if foreclosure proceedings should be commenced against the insured property, and

this provision was alleged to have been violated. The plaintiff commenced a foreclosure of his mortgage, by action, about the 1st of May, 1877, and he obtained a judgment of foreclosure, and under that judgment he caused the mortgaged premises to be advertised for sale a few days before the fire. In reference to this objection to plaintiff's recovery, the opinion pronounced at General Term contains the following: "We do not think this condition relates to the plaintiff's mortgage. It cannot be assumed that in a policy issued by the defendant, with the loss payable to the plaintiff as mortgagee, a condition would be inserted prohibiting him from foreclosing his mortgage. The condition has some other meaning." The argument of plaintiff's counsel is, that when the defendant assented to this mortgage, it necessarily assented to all the necessary incidents and consequences of the mortgage interest; that, having been notified of the interest of the mortgagee in the property, and having agreed to pay him the loss, if any, it cannot call in question the natural result and incident of such a mortgage title, to wit, the foreclosure thereof, but must be held to have agreed to it in advance. This reasoning does not carry conviction to our minds. A provision that a policy shall be void in the case of foreclosure proceedings is common in insurance policies, and we must assume that experience has shown to underwriters that such proceedings increase the risk to the insurer. The defendant might have been willing, for the premium charged, to insure this barn with the mortgage upon it, and yet not willing to insure it in case of proceedings to foreclose the mortgage. It did assent to the mortgage, and agree that the loss, if any, be paid to the mortgagee, but it did not assent to continue the insurance in case the risk was increased by proceedings to foreclose the mortgage. Before commencing the foreclosure the plaintiff should have obtained the assent of the defendant. It might have examined the circumstances and granted such assent without any conditions, or it might have required an additional premium for the increased risk. It might have refused altogether, and in that case the plaintiff could have delayed his foreclosure until the end of the year, or surrendered the policy and procured insurance elsewhere. Even if the provision were found to be very inconvenient and embarrassing, there is no help for it. There it is, and we cannot take it out of the policy by construction. There are two provisions: one, that liens, without the assent of the company, shall avoid the policy; and another, that foreclosure proceedings shall avoid it; and effect must be given to both. According to the construction contended for on the part of the plaintiff, the latter provision would be wholly useless or nulli-

fied in every case, because all liens avoid the policy unless assented to; and according to that construction, when assented to, foreclosure proceedings may be instituted without avoiding the policy. If such proceedings may be instituted as incident to the mortgage, then they may be carried to their conclusion by a sale and conveyance, and thus by assenting to a mortgage, a company may be held to have assented to a change of title of the insured property. Such a construction is unreasonable and unwarranted *Pratt v. The New York Central Ins. Co.*, 55 N. Y. 505. But we are of opinion that the claim of the plaintiff is well founded that the forfeiture caused by the foreclosure proceedings was waived by the defendant. * * * .

b. Loss by Fire: Proximate Cause.

**LYNN GAS AND ELECTRIC CO. v. MERIDEN FIRE
INSURANCE CO. & OTHERS.**

158 MASS. 570. — 1893.

CONTRACT against several insurance companies, insuring the building and machinery of the plaintiff against loss or damage by fire. A fire occurred in the wire tower, so called, of the plaintiff's building, through which the wires for electric lighting were carried from the building, which fire was speedily extinguished, without contact with other parts of the building and contents, and with slight damage to the tower or its contents. About the same time and in a part of the building remote from the fire and untouched thereby, there occurred a disruption by centrifugal force of the fly-wheel of the engine and of certain pulleys connected therewith, by which disruption the plaintiff's building and machinery were damaged to a large amount. The defendants introduced evidence tending to show that the slipping of a belt was the cause both of the fire in the tower and of the disruption of the machinery and that a defective pulley might have contributed to cause the disaster. The theory of the plaintiff is stated in the opinion.

KNOWLTON, J. — The only exception relied on by the defendants in these cases is that relating to the claim for damage to the machinery used in generating electricity and to the building from a disruption of the machinery. This machinery was in a part of the building remote from the fire, and none of it was burned. In his charge to the jury the judge stated the theory of the plaintiff as follows: "The plaintiff says the position of the lightning arresters in the vicinity of the fire was such that by reason of the fire in the

tower a connection was made between them called a short circuit; that the short circuit resulted in keeping back or in bringing into the dynamo below an increase of electric current that made it more difficult for this armature to revolve than before, and caused a higher power to be exerted upon it, or at least caused greater resistance to the machinery; that this resistance was transmitted to the pulley by which this armature was run, through the belt; that that shock destroyed that pulley; that by the destruction of that pulley the main shaft was disturbed and the succeeding pulleys up to the jack pulley were ruptured; that by reason of pieces flying from the jack-pulley, or from some other cause, the fly-wheel of the engine was destroyed, the governor broken, and everything crushed; — in a word, that the short circuit in the tower by reason of the fire caused an extra strain upon the belt through the action of electricity, and that caused the damage." The plaintiff contended that the short circuit was produced by the fire, either by means of heat on the horns of the lightning arresters, or by the flame acting as a conductor between the two horns, or in some other way. The jury found that the plaintiff's theory of the cause of the damage was correct, and the question is whether the judge was right in ruling that an injury to the machinery caused in this way was a "loss or damage by fire," within the meaning of the policy.

The subject-matter of the insurance was the building, machinery, dynamos, and other electrical fixtures, besides tools, furniture, and supplies used in the business of furnishing electricity for electric lighting. The defendants, when they made their contracts, understood that the building contained a large quantity of electrical machinery, and that electricity would be transmitted from the dynamos, and would be a powerful force in and about the building. They must be presumed to have contemplated such effects as fire might naturally produce in connection with machinery used in generating and transmitting strong currents of electricity.

The subject involves a consideration of the causes to which an effect should be ascribed when several conditions, agencies, or authors contribute to produce an effect. The defendants contend that the application of the principle which is expressed by the maxim, *Injure non remota causa sed proxima spectatur*, relieves them from liability in these cases. It has often been necessary to determine, in trials in court, what is to be deemed the responsible cause which furnishes a foundation for a claim when several agencies and conditions have a share in causing damage, and the best rule that can be formulated is often difficult of application. When it is said that the cause to be sought is the direct and proximate cause, it is

not meant that the cause or agency which is nearest in time or place to the result is necessarily to be chosen. *Freeman v. Mercantile Accident Association*, 156 Mass. 351. The active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source is the direct and proximate cause referred to in the cases. *McDonald v. Snelling*, 14 Allen, 290; *Perley v. Eastern Railroad*, 98 Mass. 414, 419; *Gibney v. State*, 137 N. Y. 529. In *Milwaukee & St. Paul Railway v. Kellogg*, 94 U. S. 469, 474, Mr. Justice Strong, who also wrote the opinions in *Insurance Co. v. Transportation Co.*, 12 Wall. 194 and in *Western Massachusetts Ins. Co. v. Transportation Co.*, 12 Wall. 201, which are much relied on by the defendants, used the following language in the opinion of the court: "The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied at the other end, that force being the proximate cause of the movement, or as the oft-cited case of the squib thrown in the market-place. 2 Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

If this were an action against one who negligently set the fire in the tower, and thus caused the injury to the machinery, it is clear, on the theory of the plaintiff that the negligent act of setting the fire would be deemed the active efficient cause of the disruption of the machinery and the consequent injury to the building. It remains to inquire whether there is a different rule in an action on a policy of fire insurance. * * * In suits brought on policies of fire insurance, it is held that the intention of the defendants must have been to insure against losses where the cause insured against was a means or agency in causing the loss, even though it was entirely due to some other active, efficient cause which made use of it, or set it in motion, if the original efficient cause was not itself made a subject of separate insurance in the contract between the parties. For instance, where the negligent act of the insured, or of anybody else, causes a fire, and so causes damage, although the negligent act is the direct, proximate cause of the damage, through the fire, which was the passive agency, the insurer is held liable for a loss caused by the fire. *Johnson v. Berkshire Ins. Co.*, 4 Allen, 388; *Walker v. Maitland*, 5 B. & Ald. 171; *Waters v. Merchants' Louisville*

Ins. Co., 11 Pet. 213; *Peters v. Warren Ins. Co.*, 14 Pet. 99, *General Ins. Co. v. Sherwood*, 14 How. 351; *Insurance Co. v. Tweed*, 7 Wall. 44. This is the only particular in which the rule in regard to remote and proximate causes is applied differently in actions on fire insurance policies from the application of it in other actions. A failure sometimes to recognize this rule as standing on independent grounds, and established to carry out the intention of the parties to contracts of insurance, has led to confusion of statement in some of the cases. The difficulty in applying the general rule in complicated cases has made the interpretation in some of the decisions doubtful; but on principle, and by the weight of authority in many well considered cases, we think it clear that, apart from the single exception above stated, the question, What is a cause which creates a liability? is to be determined in the same way in actions on policies of fire insurance as in other actions. *Scripture v. Lowell Ins. Co.*, 10 Cush. 356; *New York & Boston Despatch Express Co. v. Traders & Mechanics' Ins. Co.*, 132 Mass. 377; *St. John v. American Ins. Co.*, 1 Kernan, 516; *General Ins. Co. v. Sherwood*, 14 How. 351; *Insurance Co. v. Tweed*, 7 Wall. 44; *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 225; *Livie v. Janson*, 12 East, 648; *Ionides v. Universal Ins. Co.*, 14 C. B. (N. S.) 259; *Transatlantic Ins. Co. v. Dorsey*, 56 Md. 70; *United Ins. Co. v. Foote*, 22 Ohio St. 340.

In the present case, the electricity was one of the forces of nature, — a passive agent working under natural laws, — whose existence was known when the insurance policies were issued. Upon the theory adopted by the jury, the fire worked through agencies in the building, the atmosphere, the metallic machinery, electricity, and other things; and working precisely as the defendants would have expected it to work if they had thoroughly understood the situation of the laws applicable to the existing conditions, it put a great strain on the machinery and did great damage. No new cause acting from an independent source intervened. The fire was the direct and proximate cause of the damage according to the meaning of the words "direct and proximate cause," as interpreted by the best authorities. The instructions to the jury were full, clear, and correct, and the defendants' requests for instructions were rightly refused.

Exceptions overruled.¹

NEGLIGENCE. — In *Gove v. Ins. Co.*, 48 N. H. 41, the insane wife of the insured set fire intentionally to the insured buildings. The company defended on the ground that it was gross carelessness to

¹ See also *Ins. Co. v. Boon*, 95 U. S. 117.

leave the insane person alone on the premises, and that gross carelessness is a good defense to the action upon the policy. The court said: "The doctrine now appears to be well settled by the authorities, that a loss by fire on land, occasioned by the mere fault and negligence of the insured party, his servants or agents, without fraud or design, is a loss protected by the policies, and as such recoverable from the underwriters. Judge Story in *Waters v. The Merchants' Louisville Ins. Co.*, 11 Peters, 213; *Sherwood v. General Mutual Ins. Co.*, 14 Howard, 351; 3 Kent's Com. 374, and notes; *Ruck v. Royal Exchange Co.*, Angell on Ins. §§ 124-5 and 122; 2 Barn. & Ald. 73; *Dixon v. Sadler*, 5 M. & W. 405, 8 M. & W. 894; *Shaw v. Roberts*, 6 A. & E. 75. Generally, *negligence* is not *design*. *Catlin v. The Springfield Fire Ins. Co.*, 1 Sumner, 434. The court in the State of New York, say that before this ground of defense can be made available, there must be evidence of such a degree of negligence as will evince a corrupt design. *Hyndes v. Schenectady County Mut. Ins. Co.*, 16 Barb. 119. There are cases of gross negligence which are, in law, deemed equivalent to a fraudulent purpose or design, founded on the consideration of doing nothing, when the slightest care on the part of the insured would prevent a great injury. Judge Shaw supposes the case where the insured, in his own house, sees the burning coals in the fire-place roll down on his wooden floor, and does not brush them up. This would be nonfeasance, and evidence of a culpable recklessness, and indifference to the rights of others. He also supposes the insured premises to take fire, and the flames beginning to kindle in a small spot, which a cup of water might put out, and the insured has the water at hand, but neglects to put it out, this, also, would be culpable negligence, manifesting a willingness differing little in character from a fraudulent and criminal purpose to commit injury to others. *Chandler v. Worcester Mut. Fire Ins. Co.*, 3 Cush. 328, 31 Maine, 219; *Huckins v. Insurance Co.*, 31 N. H. 238; Angell on Ins. § 130. * * * We cannot see in this case evidence of the existence either of design or of that degree of negligence or carelessness which will constitute a legal defense for the defendants."

EXPLOSION. — *Where there is, in the policy, no provision as to explosion.* In *Millaudon v. Ins. Co.*, 4 La. Ann. 15, it was held that the policy did not cover loss caused by an explosion of steam boilers, no damage having been caused by fire. But in *Scripture v. Ins. Co.*, 10 Cush. 356, a burning match applied to a cask of gunpowder in a house, caused damage to the house; that damage being in part from combustion and in part from explosion. The policy insured "against loss or damage by fire." The court said: "Where the

effects produced are the immediate results of the action of a burning substance in contact with a building, it is immaterial whether those results manifest themselves in the form of combustion, or of explosion, or of both combined. In either case, the damage occurring is by the action of fire and covered by the ordinary terms of a policy against loss by fire."

Where there is, in the policy, a provision as to explosion. In *The Boatman's Fire and Marine Ins. Co. v. Parker*, 23 Ohio St. 85, where the policy provided that the company shall not be liable "for damage occasioned by the explosion of a steam boiler, nor for damage resulting from such explosion, nor explosions caused by gunpowder, gas or other explosive substances * * * unless otherwise expressly provided," the insured was allowed to recover for damage by fire resulting from an explosion of gas. In *United Fire, Life and Marine Ins. Co. v. Foote*, 22 Ohio St. 340, the policy provided that the company shall not be liable for "any loss or damage occasioned by, or resulting from, any explosion whatever," etc. A fire followed an explosion of spirit vapor ignited by the flame of a gas jet and the insured was not allowed to recover for loss occasioned by this fire.

In *Briggs v. Ins. Co.*, 53 N. Y. 446, the plaintiffs were engaged in the business of rectifying spirits and insured their machinery by a policy which contained this provision: "This company shall not be liable for loss caused by * * * explosions of any kind, unless fire ensues and then for the loss or damage by fire only." Vapor from the works coming in contact with a burning lamp caused an explosion which injured the machinery. No recovery was allowed for the damage caused by the explosion, the court saying, "The plaintiffs insist, however, that an explosion caused by fire is a fire, and therefore the defendant is liable for the explosion, as for a fire. But that reasoning gives no force to the exception. It allows a recovery for the explosion, when the policy expressly stipulates that the defendant will not be liable for that. * * * There was no fire prior to this explosion. The burning lamp was not a fire within the policy. The machinery was not on fire, as such a term is ordinarily used, until after the explosion. The explosion here was the principal and the fire the incident."

Loss caused by the explosion of a lamp is covered by a policy which provides that the company shall not be liable for loss caused by "explosions of any kind whatever;" the argument being that the exception covered by this section is to be restricted to losses arising from explosions, rather than extended to the much broader ground of losses by fire originating from explosions. — *Heffron v. Ins. Co.*, 132 Pa. 580.

FALLING BUILDING. — In *Ermentrout v. Ins. Co.*, 63 Minn. 305, the policy stipulated: "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." The insured building was adjacent to another used as a feed mill, the wall between them being a partition wall. The feed mill caught fire before the insured building fell, and that fall was caused by the partial consumption of the feed mill and the weakening of the partition wall. No part of plaintiff's building was actually ignited or consumed by fire. In holding that the falling of the insured building was a direct "loss or damage by fire," within the meaning of the policy, the court said, speaking of the exception: "We think it has reference only to cases where the building might fall from some other cause than fire, — as, for example, defective construction, the withdrawal of necessary support, storm, flood or other like cause, — and fire thereafter ensued. But it was not intended to exclude cases where fire was the immediate or proximate cause of the fall. To render the fire the immediate or proximate cause of the loss or damage, it is not necessary that any part of the insured property actually ignited or was consumed by fire. * * * The question is, was fire the efficient and proximate cause of the loss or damage."

As to what constitutes a fallen building see *Fireman's Fund Ins. Co. v. Sholm*, 80 Ill. 558, where it was held that the building had not fallen when, by a windstorm, it had been moved partly off the posts upon which it rested. The building remained united although it leaned toward the street and was so far rendered unfit for occupancy that most of the movable furniture had been taken out. In *Huck v. Ins. Co.*, 127 Mass. 306, the building was held to have fallen, since nothing remained standing but the outer walls and the elevator five feet square, in one corner. See also upon this point, *Insurance Co. v. Crunk*, 91 Tenn. 376.

LIGHTNING. — In *Babcock v. Ins. Co.*, 6 Barb. 637 (affirmed in 4 N. Y. 326), the building was insured generally against loss by fire and in a separate clause the policy declared that the insurers would be liable for fire by lightning. The declaration alleged that the building "was struck by lightning and was thereby prostrated and demolished." Demurrer on the ground that the declaration did not show that the building was consumed or injured by fire. It was held that the plaintiff had not averred a loss within the meaning of the policy.

REMOVAL FOR SAFETY. — It was held in *White v. Ins. Co.*, 57 Me. 91, that the damage and expense caused by removing, with that reasonable degree of care suited to the occasion, insured goods from

an apparent imminent destruction by fire, are covered by a policy insuring against "loss or damage by fire," although the building in which they were insured and from which they were thus removed, was not in fact injured by the fire.

c. Respecting Matters After Loss.

1. PROOFS OF LOSS.

BUMSTEAD *v.* DIVIDEND MUTUAL INSURANCE CO.

12 N. Y. 81. — 1854.

ACTION on a policy of insurance, tried before a referee, who found for the plaintiff. The judgment ordered by the referee was affirmed.

W. F. ALLEN, J.—* * * The plaintiff, as a condition precedent to his right to recover was, by the by-laws of the company, bound to give notice forthwith of his loss, and within thirty days deliver in a particular account of such loss or damage, signed with his own hand and verified by his oath or affirmation, and also, if required, by his books of account and other proper vouchers; and by the condition annexed to the policy, he was bound to furnish an inventory of all property destroyed or damaged, giving the value in cash of the damage sustained to each item — whether a building or other property — verified by his affidavit. The conditions are reasonable, and for the benefit of the insurers, to enable them to decide upon their rights and the extent of their liability before they are called upon to pay; and no liability attaches until they have been complied with by the insured. *Mann v. Harvey*, 8 Exch. Rep. 819.

What shall be considered a performance, so as to entitle a party to insist upon payment of a loss within the policy, depends upon the true construction of the contract of the parties. A strict interpretation of the language employed would not unfrequently prevent a recovery against the company, as no exceptions are made to the requirement to furnish the inventory and produce the books of account and other vouchers. The inventory required is one strictly accurate, not approximating to accuracy, and made according to the best knowledge the party may have. Such a statement, although made out with all care and honesty, and really affording to the insurers all the information they could reasonably desire, would not be an inventory of the property destroyed within the literal condi-

tion. So the non-production of the books and vouchers which had been destroyed by the very fire against which the party had sought an indemnity would effectually defeat his claim under his policy. Such an interpretation would be unreasonable, and cannot be supposed to have been in the minds of the contracting parties at the time the insurance was effected.

The construction of these conditions should be reasonable, and as near the apparent intent of the parties as may be consistent with the terms employed, taking into consideration the motives that led to their insertion in the contract and the object intended to be effected by them. It was not practicable for the parties to provide for every case which might arise, but they could and did provide in general terms for ordinary cases, and having done so, extraordinary cases and exceptions were necessarily left to be decided upon the general principles which they prescribed for those most likely to happen. Ordinarily the books of the insured might be preserved and capable of production at the call of the insurer, and hence their production, if called for, was made a condition precedent to the liability of the underwriter. This clause should not, however, be so construed as to require the party to produce books which he had not, and which, without fault on his part, he could not produce. So, if all means of making an accurate inventory of the property destroyed were lost, the condition should be so construed as only to require the best and most perfect statement which the party could make. This class of conditions, annexed to and making a part of contracts of insurance, has always been liberally construed as requiring only good faith on the part of the assured and the best evidence of his loss which he could give, and so as to secure to the insurer all the substantial benefits of the conditions. If this has been found necessary, in former times, in order to give effect to the contract of insurance as a real and not an illusory contract of indemnity, it is still more necessary now, when, with the multiplication of companies holding themselves out as insurance companies and bidding for risks, legal ingenuity and practical experience and skill have been exerted to the utmost to devise terms and conditions and new and unheard-of provisions by which the nominal underwriters may guard against a legal liability in case of a loss of the property insured by the perils proposed to be insured against.

The only safety for the insured is to apply the same rules of construction to the new terms and conditions which have been by the courts applied to the same contract heretofore, and to give them that reasonable construction which good faith and good sense require. In *Norton v. Rensselaer & Saratoga Company*, 7 Cow. 649,

Savage, Ch. J., says: "The clause requiring proof of marine losses has been construed with considerable liberality. The courts have looked to the circumstances, and required no more information of the party than what appeared to be within his control;" and the same liberal construction was in that case extended to a fire policy. Thompson, J., in *Lamere v. The Ocean Insurance Company*, 11 J. R. 260, says: "This clause has always been liberally expounded, and is construed to require only the best evidence of the fact which the party possesses at the time." Such has been the uniform construction put upon it by the courts. See also 2 J. R. 136; 8 Id. 317; *McLaughlin v. The Washington County Mutual Ins. Co.*, 23 W. R. 525.

The "particular account of the loss or damage," and the "inventory of all property destroyed or damaged, giving the value in cash of the damage sustained to each item," require the party only to furnish a statement as particular and full as he can under the circumstances make. The books and papers of the plaintiff having been destroyed by the same fire which consumed the merchandise insured, he is thus deprived of the only means by which he could comply literally with the conditions of the policy, and a less particular statement is sufficient and all that is called for within the fair meaning and intent of the parties as expressed in the contract by the conditions. * * *

The plaintiff, in his first statement of loss, says that the entire amount of the property contained in his store and partly covered by said insurance, that is, insured to a part of its value, together with his books and papers, was destroyed by fire; that the total amount of property in said store, owned by him and destroyed, was at least \$2,000, and, as he believed, much more, but from the destruction of his books, papers, bills of purchase and inventories he was unable particularly to set forth the same. The fact that he afterwards attempted, at the request of the company, to make a more particular statement from recollection and estimate, as did Norton in the case in 7 Cowen, does not tend to invalidate the truth of the statement; and in the absence of fraud or of evidence tending to impeach its accuracy, the proof was a substantial compliance with the conditions of insurance and the by-laws of the company, and sufficient to entitle the plaintiff to recover. The conclusion to which I have come upon the question considered, renders it unnecessary to examine the other question, which is of less general interest, to wit, whether the defendants did not, by receiving and acting upon the proofs furnished, without objections, assent to their sufficiency and waive any formal objection which might have been taken to them.

But upon this ground I think there is sufficient evidence in the case to warrant the decision and uphold the judgment in the court below. * * *

Affirmed.¹

2. MAGISTRATE'S CERTIFICATE.

MITCHELL, J., IN LANE *v.* INSURANCE CO.

50 MINN. 227. — 1892.

THE policy sued on contained a provision that the insured "shall, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances, and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify." It also provided that "no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements." * * *

Provisions similar to this are as old as fire insurance policies themselves, and the doctrine has been established by a uniform current of authorities in England and this country, beginning with *Oldman v. Bewicke*, 2 H. Bl. 577, and *Routledge v. Burrell*, 1 H. Bl. 254, that the production of such certificate, unless the insurance company itself has prevented the obtaining it, or waived its want,

¹ Accord, *People's Ins. Co. v. Pulver*, 127 Ill. 246. Where the policy provided that the proofs of loss must be "rendered" within 60 days, it was held sufficient if the proofs were mailed within 60 days, although not received within that period.—*Manufacturer's Ins. Co. v. Zeitinger*, 168 Ill. 286. If the policy provides that in case of loss the insured "shall give immediate notice thereof and shall render to the company a particular account of said loss under oath," embracing certain facts specified, it is the duty of the insured to furnish the proofs of loss within a reasonable time, the court saying, in *Carpenter v. Ins. Co.*, 135 N. Y. 295, 303: "What is such reasonable time may become a question of law as where there has been a long delay unexcused. * * * But in cases where circumstances are shown which reasonably justify the delay or the insured acted with reasonable promptness in view of all the facts disclosed having regard both to his own situation and the protection of the company, it may be a question for the jury whether the provision as to proofs has been violated."

NOTICE OF LOSS. "Under the provision of the policy requiring notice of loss to be 'forthwith' given, it was enough for the insured to act in that matter with diligence and without unnecessary delay." — *Griffey v. Ins. Co.*, 100 N. Y. 417, 421.

is a condition precedent to the right of the insured to recover; that the assured, by accepting the policy, assents to the condition; that it is one which the company has a right to impose, and for which it is not bound to accept any substitute; that the inability of the insured to furnish it because of the refusal of the magistrate or notary, for any cause whatever, to give it, will not relieve him from the performance of the condition; that the case comes within the rule by which one who engages for the act of a stranger must procure the act to be done, and the refusal of the stranger without the interference of the other party is no excuse. The inability of the insured to procure the certificate because of such refusal does not render the condition impossible in the legal sense, so as to excuse the party from performing his contract. The cases on the subject will be found cited in any text-book on fire insurance, but among a few of the leading ones are *Worsley v. Wood*, 6 Term R. 710; *Insurance Co. v. Lawrence*, 2 Pet. 25, 10 Pet. 507; *Roumage v. Insurance Co.*, 13 N. J. Law, 110; *Leadbetter v. Insurance Co.*, 13 Me. 265; *Johnson v. Insurance Co.*, 112 Mass. 49. We are not aware of a single authority to the contrary, except a suggestion, in *Insurance Co. v. Miers*, 5 Sneed, 139, that such a condition is directory only, and a dictum, in *Insurance Co. v. Block*, 109 Pa. St. 535, 1 Atl. Rep. 523, repeated in *Davis Shoe Co. v. Kittanning Ins. Co.*, 138 Pa. St. 73, 20 Atl. Rep. 838, that such conditions are void for the reason that an insurance company has no right to require a public officer to act in the adjustment of losses. But this was expressly overruled by the same court in *Kelly v. Sun Fire Office* 141 Pa. St. 10, 21 Atl. Rep. 447. While the doctrine that such stipulations are valid and constitute a condition precedent to the insured's right to recover is unquestionably sound in principle, yet, as they often operate harshly in practice, they have, in some States, been expressly or impliedly prohibited by statutes regulating the form of policies. See *Shannon v. Insurance Co.*, 2 Ont. App. 81; *Insurance Co. v. Johnson*, 46 Ind. 315. But there is no room in this State for holding such conditions void or unreasonable, for they have been incorporated into the Minnesota standard policy by the insurance commissioner, under the authority vested in him by Laws 1889, c. 217, by the provisions of which all fire insurance policies are required to conform to the form prepared by him, and any other or different form is prohibited.¹

¹*Contra*: "The right of a citizen to maintain an action in the courts of this state is fixed by the constitution and the laws thereof, and we do not think that right can be made to depend upon the whim of a justice of the peace or a notary public. Suppose that this justice of the peace should be the enemy of the insured

3. EXAMINATION OF THE INSURED.

HINMAN, C. J., IN HARRIS v. PHOENIX INSURANCE CO.

35 CONN. 310, 312. — 1868.

ONE of the conditions in the policy is "that the assured shall, if required, submit to an examination under oath by any person appointed by the company, and if deemed necessary by the company, to a second examination, and subscribe to such examination when reduced to writing; and shall also produce his books, etc." And then the policy provides by an express stipulation, that "until such proofs, declarations and certificates are produced and examinations and appraisals permitted, the loss shall not be payable." * * * As the plaintiffs stand upon the right of the assured, Bass, and are in no better condition than he would be, were he now prosecuting his suit for damages caused by the loss, (*Dewit v. Baldwin*, 1 Root, 138,) it becomes important to determine whether the stipulation for his personal examination is a condition precedent to his right under the policy. The plaintiffs insist that it is not such a condition in this case, because it does not appear that notice

or for any other reason should refuse to furnish the insured a certificate of good moral character, and should refuse to examine into the circumstances attending the loss and the financial condition of the insured. How is the insured to compel the making of this certificate? We are aware that the supreme court of the state of Minnesota in *Lane v. Insurance Co.*, 50 Minn. 227, sustained a provision like the one under consideration, and held that the furnishing of the certificate was a condition precedent to the right of the insured to recover, and that his inability to furnish the certificate because of the refusal of the magistrate to give it afforded no excuse for the insured's failure. But it is to be remembered that in that state the legislature prescribes the terms and conditions of all fire insurance policies, and such was the policy considered in the case last cited. Furthermore, the constitution of this state provides that "all courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." (Constitution, Section 13, Art. 1.) It may be that the legislature has the authority to provide that before an insured can maintain an action in the courts to recover for a loss on an insurance policy he must procure the certificate of a magistrate next to where the loss occurred that he has examined into the conditions of the loss, and believes that it occurred without the fault of the insured, that the insured is of good moral character, and that he is acquainted with his financial condition. But we shall hesitate a great while before we uphold any such provision as this, in the absence of express legislation requiring it." — *Home Co. v. Hammang*, 44 Neb. 566, 577.

The New York courts are not favorable to a rigid interpretation of the provision. *Turley v. Co.*, 25 Wend. 374; *Gilligan v. Co.*, 20 Hun, 93, aff'd 87 N. Y. 626; *McNally v. Co.*, 137 N. Y. 389.

that a personal examination was required has ever been brought home to the assured. If this was so in consequence of the fault of the defendants there would doubtless be force in the suggestion. But the defendants have not been in fault. Having used due diligence to notify the assured that they required the performance of this stipulation, they clearly ought not to be held to have waived its performance. If the assured has intentionally absented himself so that he cannot be notified that performance of the stipulation is required, he should be held to have had notice. And if for any cause, whether by his fault or otherwise, he cannot be notified, that may be his misfortune or the misfortune of those claiming under or through him, but is no reason for treating as inoperative an important stipulation which the defendants saw fit to require, and the assured to give, as a condition which was to be complied with before there could be any obligation to pay for the loss.¹

¹ "Another plea set forth as a bar to the action is, that the insured refused to submit his books and invoices for examination when requested. This plea was based upon one of the conditions of the policy to which the plaintiff assented. All the insured was entitled to recover, in the event of a loss, was pay for goods actually destroyed. Books of account and invoices are the only means, in most cases, of arriving at such amount of the liability of the company. Where an insurance policy makes it incumbent on the insured, in the event of a loss, to produce his books or invoices for examination, he must comply with such provision or he cannot recover. *Jube v. Insurance Co.*, 48 Barb. 412; *Haff v. Insurance Co.*, 4 Johns. 132; *O'Brien v. Insurance Co.*, 63 N. Y. 108; *Phillips v. Insurance Co.*, 14 Mo. 220; *Bonner v. Insurance Co.*, 13 Wis. 677; *Harris v. Insurance Co.*, 35 Conn. 310; *Thomas v. Insurance Co.*, 47 Mo. App. 169. It is urged by appellee as a reason for not complying with this provision, that he kept no books of account. But that is not a sufficient legal avoidance of this condition.

* * * In this case the insured obligated himself to produce his books of account and invoices, so that, in the event of a loss, the insurance company might have before it some evidence of the amount of loss sustained by him. This condition contracted by him to be observed was a reasonable one, and a failure on his part to comply therewith, without some excuse therefor, presented a sufficient defense by appellant, which it could only set up by way of special plea. The plea of the appellant, therefore, which set up this defense, was a proper one, and the demurrer to it should have been overruled." — *Niagara Ins. Co. v. Foxhand*, 169 Ill. 626, 629, 630.

In *Claffin v. Ins. Co.*, 110 U. S. 81, the policy required that in case of loss, the assured should submit to an examination under oath by an agent of the insurer, and that fraud or false swearing should forfeit the policy. It was held that although the assured swore truthfully as to his actual loss, yet if he swore falsely as to the persons from whom he had purchased the goods or the value of those purchased from a certain house, even though the false swearing was with no intent to deceive the defendant, but was for the purpose of deceiving other persons, nevertheless the policy was forfeited thereby, for the question of assured's insurable interest was in issue and these answers were material upon that point.

4. SAFE CLAUSE.

GEORGIA HOME INSURANCE CO. *v.* ALLEN.

119 ALA. 436. — 1898.

IN the policy upon which this action was brought the "iron safe clause" was substantially that the assured covenanted and agreed to keep a set of books showing a record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory in said business; to keep such inventory securely locked in a fire-proof safe at night and at all times when the store is not actually opened for business or in some secure place not exposed to a fire which would destroy the house where said business is carried on; and in case of loss the assured covenanted and agreed to produce such books and inventory and in event of failure to produce the same the policy was to be deemed null and void.

HARALSON, J. — * * * 6. It is well settled that an iron-safe clause, such as the one contained in this policy which the insured covenanted to keep, is a condition, the breach of which will avoid the policy, but that it is one that may be waived, like any other conditions. 3 Joyce, Ins., §§ 2063, 2064. The author, after referring to the authorities on the subject, concludes: "In a federal case it is held, a substantial compliance is sufficient under the 'iron-safe clause,' requiring a set of books and an inventory to be securely locked in a fireproof safe at night and at all times when the store is not actually open for business, or in some secure place, and that in case of loss, assured will produce said books and inventory; such a clause is a condition subsequent only, and a literal, exact fulfillment is unnecessary. This decision certainly seems more in accord with the actual intent of the parties, and with justice and reason of the law, and with the tendency of the decisions, than a construction requiring an exact and literal compliance." Joyce, Ins., § 2063; *Assurance Co. v. Redding*, 15 C. C. A. 619, 68 Fed. 708.

It has come to be well settled, also, that conditions and duties of the assured prescribed in a policy of insurance, should be liberally construed in favor of the assured, but strictly against the insurer. *Insurance Co. v. Young*, 58 Ala. 476; *Tubb v. Insurance Co.*, 106 Ala. 651, 659, 17 South 615.

In seeming recognition of these principles, the defendant requested the fourth instruction to the jury. The plaintiff's own evidence showed, without conflict, that he had not made even a substantial compliance with his covenants of the iron-safe clause of his policy. He testified that he made entries of sales upon a pocket memoran-

dum book, and when he got time he would transfer these entries to the blotter, and from the blotter to the ledger; that he made these transfers of entries once a week probably, and sometimes oftener; that at the time, the four last days' sales had not been transferred to the ledger, and he had lost his pocket memorandum book, and the blotter had been left on his desk the night of the fire, which he sometimes did, and it had been destroyed by the fire; that the blotter was the only book in which he made entries of goods bought and sold on credit; that he made transfers from the blotter to the ledger, sometimes once a day, sometimes in three days and sometimes not till the end of the week. He also swore that the blotter showed the amount of the goods used out of the store by himself and family for a part of the time, but that for the months of September, October and November, 1894, he made no entries in the blotter or elsewhere of the goods or cash used out of the store by himself and family, and the adjuster was left to calculation merely as to these items omitted from the ledger. The object of the iron-safe clause is to enable the insurer, in case of a fire, to arrive more accurately than he otherwise would be able to do, at the exact amount of the loss. We are unable, therefore, according to plaintiff's own undisputed showing, to say that he complied substantially, even, with the requirements of this covenant. This was sufficient to defeat a recovery by him, unless the jury was satisfied from the evidence, that the defendant or its agent, with full knowledge of the forfeiture, waived it. This is all that the fifth instruction asked, and it should have been given. * * *

¹ " This clause, now almost universally introduced into policies of insurance of merchandise kept for sale against loss by fire, has been of frequent consideration by the courts, and most usually, it has not been subjected to any narrowness or closeness of construction. Legal effect has been given it, for the purpose of guarding the insurer against the fraud or imposition of the insured; but it has received a fair, reasonable interpretation, so that it may not work forfeitures, or defeat the claim of the innocent insured to the indemnity promised by the policy. *Liverpool, etc., Ins. Co. v. Ellington*, 94 Ga. 785; *Western Assurance Co. v. Redding*, 68 Fed. Rep. 708; *Standard Fire Ins. Co. v. Willock*, 29 S. W. Rep. 218. In *Liverpool Ins. Co. v. Ellington*, *supra*, it is said by the court: ' Under the clause referred to, it was not indispensable that the books kept should embrace what is usually termed a cash book, or that the books should be kept on any particular system. It was sufficient if the books were kept in such manner that, with the assistance of those who kept them or understood the system on which they were kept, the amount of purchases and sales could be ascertained, and cash transactions distinguished from those on credit.' In *Standard Ins. Co. v. Willock*, *supra*, the court found a ' substantial compliance ' with the requirements of the clause, and sustained a recovery against the insurer." — *Western Assur. Co. v. McGlathery*, 115 Ala. 213, 223.

5. ARBITRATION.

HAMILTON v. HOME INSURANCE CO.

137 U. S. 370 — 1890.

MR. JUSTICE GRAY. — This case resembles in some aspects that of *Hamilton v. Liverpool, London & Globe Ins. Co.*, 136 U. S. 242, decided at the last term, but is essentially different in important and controlling elements. In that case, the effect of the provisions of the policy, by reason of which it was held that the assured, having refused to submit to the appraisal and award provided for, could not maintain his action, was thus stated by the court: "The conditions of the policy in suit clearly and unequivocally manifest the intention and agreement of the parties to the contract of insurance that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted, at the request in writing of either party, to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of the liability of the company; that the company shall have the right to take the whole or any part of the property at its appraisal value so ascertained; and that until such an appraisal shall have been permitted, and such an award obtained, the loss shall not be payable, and no action shall lie against the company. The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss and to the maintenance of any action." 136 U. S. 254, 255. That policy looked to a single appraisal and award, to be made as one thing and by one board of appraisers or arbitrators, whenever any difference should arise between the parties, and to be binding and conclusive as to the amount of the loss, although not to determine the question of the liability of the company; and the policy con-

"The contention of counsel for the insurer is, that having covenanted to keep the books in a fireproof safe, and, in the event of the loss by fire of the property insured, thereafter, to produce them before the insurer, the insured was absolutely bound to procure the books, and that no casualty can excuse any failure to comply with this condition to produce the books. * * * The words 'fireproof safe' in this policy, in view of the situation of the small country merchant, and his needs for and employment of an iron safe, can only mean the usual fireproof safe used by the country generally — a safe composed of incombustible materials, and fitted to protect, to the usual extent and in the ordinary way, books and papers deposited therein, and not that rare and costly structure (if, indeed, such there be), which is capable of successfully withstanding the action of fire altogether, and of preserving its contents from harm absolutely." — *Sneed v. Co.*, 73 Miss. 279, 282, 283.

tained not only a provision that until such an appraisal the loss should not be payable, but an express condition that no action upon the policy should be sustainable in any court until after such an award.

In the case now before us, on the other hand, the appraisal and the award are distinct things and to take place at separate times, and the effect assigned to each is quite different from that given to the appraisal and award in the other policy. The "appraisal," without which the loss is not payable, is required to be made, not merely when differences arise as to its amount, but in all cases, and results in a mere "report in writing," which is not declared to be binding upon the parties in any respect, and is in truth but a part of the proofs of loss. It is only by a separate and independent provision, and when differences arise touching any loss "after proof thereof has been received in due form," that the matter is required, at the request of either party, to be submitted to "arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss, but shall not decide the liability of this company under the policy;" and there is no provision whatever postponing the right to sue until after an award.

The special defenses set up, with some tautology and surplusage, in the answer, reduce themselves, when scrutinized, to a single one, the plaintiff's refusal to submit to an award of arbitrators, as provided in the policy. This appears by the general frame of the answer, and by its speaking of the award as "an arbitration and the ascertainment of the said loss thereby" and as "an appraisal by arbitrators," as well as by the distinct averment that the defendant requested and the plaintiff declined a submission to arbitration, and by the omission of any specific allegation that the plaintiff neglected to procure a report of appraisers. The evidence introduced at the trial was to the same effect. Proofs of loss, sent by the plaintiff to the defendant, with a request that any defects in substance or form might be pointed out so that he might perfect the proofs to the defendant's satisfaction, were received by the defendant, without then or afterwards objecting to their form or sufficiency. The subsequent correspondence between the parties was evidently influenced in form by embracing insurances in different companies under policies with various provisions; but, as applied to the policy in suit, it manifestly related, and was understood by both parties to relate, not to a mere report of appraisers, but to an award of arbitrators which should bind both parties as to the amount of the loss. The instruction to the jury, therefore, that on the issues joined on the special defenses in the answer, and upon

the evidence in the case, the plaintiff could not recover, was in effect a ruling that the plaintiff could not maintain his action because he had refused to submit the amount of his loss to arbitration.

A provision, in a contract for the payment of money upon a contingency, that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such an award, then, as was adjudged in *Hamilton v. Liverpool, London & Globe Ins. Co.*, above cited, and in many cases therein referred to, the award is a condition precedent to the right of action. But when no such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount for arbitration is collateral and independent; and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract. *Roper v. London*, 1 El. & El. 825; *Collins v. Locke*, 4 App. Cas. 674; *Dawson v. Fitzgerald*, 1 Ex. D. 257; *Reed v. Washington Ins. Co.*, 138 Mass. 572; *Seward v. Rochester*, 109 N. Y. 164; *Birmingham Ins. Co. v. Pulver*, 126 Illinois, 329, 338; *Crossley v. Connecticut Ins. Co.*, 27 Fed. Rep. 30. The rule of law upon the subject was well stated in *Dawson v. Fitzgerald*, by Sir George Jessel, Master of the Rolls, who said: "There are two cases where such a plea as the present is successful: first, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant " "to bring an action for not referring," or (under a modern English statute) "to stay the action till there has been an arbitration." 1 Ex. D. 260. Applying this test, it is quite clear that the separate and independent provision, in the policy now before us, for submitting to arbitration the amount of the loss, is a distinct and collateral agreement, and was wrongly held by the Circuit Court to bar this action.

Judgment reversed, and case remanded, with directions to set aside the verdict, and to take such further proceedings as may be consistent with this opinion.¹

¹ See also *Reed v. Ins. Co.*, 138 Mass. 572.

MARSHALL, J., IN FOX v. MASONS' FRATERNAL ACCIDENT ASSOCIATION.

96 WIS. 390, 394. — 1897.

COUNSEL for the appellant claim that the learned circuit judge erred in not nonsuiting the plaintiff, because the contract of insurance prohibits any suit other than to enforce payment of an award of arbitrators, except upon the refusal of the association to arbitrate. The contract was clearly so worded as to require all questions between the association and the assured to be, at its option, settled by arbitration, and to thereby wholly oust the court of jurisdiction over every part of the subject of liability, and the amount thereof as well. On grounds of public policy, all agreements between parties to submit the whole subject-matter of their differences to arbitration, wholly stipulating away the rights of each or either party to resort to the tribunals created by the law of the land for a determination of such differences, are void, and have been uniformly so held. *Hamilton v. Insurance Co.*, 136 U. S. 242, 10 Sup. Ct. 945; *May, Ins.*, § 492; *Leach v. Insurance Co.*, 58 N. H. 245. Agreements to arbitrate special matters, such as, under an insurance policy, the amount of the loss, something that does not go to the whole groundwork of the controversy, have been as universally sustained. *Viney v. Bignold*, 20 Q. B. Div. 172; *Scott v. Avery*, 5 H. L. Cas. 811; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250; *Reed v. Insurance Co.*, 138 Mass. 572; *Wolff v. Insurance Co.*, 50 N. J. Law, 453, 14 Atl. 561; *Hall v. Insurance Co.*, 57 Conn. 105, 17 Atl. 356.¹ It is not here contended, as we understand it, that the contract in question belongs to the first class, or that a general provision requiring the whole subject of a controversy to be submitted to arbitration can ordinarily be sustained, but it is contended that such contract is of a class which forms an exception to the general rule, because, as said by counsel for appellant, the association is purely a mutual company; that its contracts are between certificate holders; and that any inexpensive method they may see fit to adopt to settle their differences should be upheld. No

¹ *Cont'a*: In Nebraska a provision in a policy that no action shall be sustained until after an award by arbitration fixing the amount due after the loss, is void, as having the effect of ousting the courts of their jurisdiction. — *Nat. Masonic Accident Assoc. v. Burr*, 44 Neb. 256; *Ins. Co. v. Bachler*, *Id.* 549.

In those states where a valued policy is required by statute, the provision in the policy for arbitration does not apply in case of a total loss, except it may be to ascertain the value of the debris. The provisions of the statute override the arbitration clause to that extent. — *German Ins. Co. v. Eddy*, 36 Neb. 461.

authority is brought to our attention to support such contention, and we may safely say that none exists, and that there is no reasonable theory upon which it can rest. There is no exception to the rule that parties cannot wholly deprive themselves, by contract, of the right to resort to the courts of the country to settle controversies between them; hence it necessarily follows that the ruling of the trial court that the arbitration clause in the certificate under consideration was void at the election of either of the parties must be sustained.¹

6. PRO-RATING AND CONTRIBUTION.

LUCAS v. JEFFERSON INSURANCE CO:

6 COWEN, 635. — 1827.

ASSUMPSIT on a policy of insurance.

The defendants, by a policy dated August 23d, 1824, insured the plaintiff against loss by fire to the amount of \$4,000, on certain cotton and woolen machinery, at Mechanicville, Saratoga county. The Chatham and Aetna Fire Insurance Companies, also insured the plaintiff on the same property; the former to \$5,500, the latter \$6,000. A loss had been sustained by fire. The evidence on the part of the plaintiff, made the amount about \$20,000; and that on the part of the defendants, between nine and ten thousand dollars. The policy under-written by the defendants, contained the following clause: "In case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the

¹ In *Robinson v. Templar Lodge*, 117 Cal. 370, the constitution of the defendant mutual benefit society provided that with respect to payments of assessments or benefits "all questions whether of law or fact * * * appertain to the sole jurisdiction of this lodge and authorities of this order, and their decision in the premises shall be binding * * * ." The court said (p. 375): "The society has many of the features of an organized charity, and it has been said that the claim for a sick benefit is not a property right. In short, the rules of law have not been applied to these institutions with the same strictness with which they have been applied to corporations organized for profit. In an ordinary case I should be loth to hold that one can effectually waive his right to sue in a court of law before his action has arisen, or that he can in advance agree to an arbitration, but it has been so held with reference to these mutual benefit societies, and, with reference to them, I think the regulation reasonable. *Rood v. Railway etc., Assn.*, 31 Fed. Rep. 62; *Van Poucke v. Netherland, etc., Soc.*, 63 Mich. 378; *Canfield v. Great Camp, etc.*, 87 Mich. 626, 24 Am. St. Rep. 186. But even if this view were not correct there can be no doubt of the proposition that he must first exhaust all the remedies afforded within the order before he can maintain an action at law. No such fact is averred in the complaint, and, as I

insured shall not, in case of loss or damage, be entitled to demand or recover on this policy, any greater portion of the loss or damage sustained, than the amount insured shall bear to the whole amount insured on said property." The Chatham and Ætna companies had each paid the amount of their insurance, deducting one-sixth, making together \$9,583.34. These were voluntary payments without suit, by arrangement between the parties. The judge charged the jury, that in ascertaining the amount to be recovered, they were not to take into consideration the payments made to the plaintiffs by other insurance companies, provided those companies were aware of the existence of all the policies on the property at the time they paid the plaintiff for his loss; and made the settlement solely with the view of discharging the claim of the plaintiff against themselves. And that if the value of the property insured, and the amount of the loss by fire, were equal to all the sums insured by the different underwriters, the verdict, if the jury should think the plaintiff entitled to recover, ought to be for the face of the policy, with interest. But if the value of the property insured, and the loss by fire, were less than the aggregate amount of the sums insured by the different underwriters, the verdict ought to be only for such a proportion of the loss or damage sustained by the plaintiff, as the amount insured by the defendants bore to the whole amount insured. To this charge, the defendants excepted; the judge sealed a bill of exceptions; on which the defendants now move for a new trial.

Curia, per WOODWORTH, J. — No objection was raised on the argument, as to the finding of the jury; nor can this be questioned on a bill of exceptions. It was contended that the charge of the

understand the record, although previous application had been made for benefits which had accrued before the time during which the benefits here sued for accrued, there is no evidence which tended to show that any application at all had been made to the lodge for the amounts here sued for. The authorities all seem to hold that this resource must be first exhausted. They are too numerous to admit of full citation. In this state the following cases so hold: *Levy v. Magnolia Lodge*, 110 Cal. 297; *Robinson v. Irish, etc., Soc.*, 67 Cal. 135. I can discover no support whatever for a contrary opinion in *Robinson v. Templar Lodge*, 97 Cal. 62."

In *Raymond v. Farmers' Mut. Fire Ins. Co.*, 114 Mich. 386, a by-law provided that "any and all differences" were to be settled by arbitrators, and the court held that such a provision was not against public policy as ousting the jurisdiction of the courts, the court saying: "By the terms of the contract, this claim has not become due and could not unless a sum should be awarded by the arbitrators." The same court had previously applied this doctrine to mutual benefit societies providing sick and death benefits. — *Fillmore v. Knights, etc.*, 103 Mich. 437.

judge was erroneous, on the ground that the defendants were entitled to the benefit of the payments made by the other companies; and that, inasmuch as the whole of the loss sustained had been already paid, the defendants were entitled to a verdict. It is well settled, that upon a double insurance, though the insured is not entitled to two satisfactions, yet in the first action, he may recover the whole sum insured, leaving the defendant to recover a ratable satisfaction from the other insurers (1 Bl. Rep. 416.) In such cases, the two policies are considered as making but one insurance. They are good to the extent of the value of the effects put in risk. The insured may sue the underwriters on both policies; but he can only recover the real amount of his loss, to which all the underwriters shall contribute in proportion to their several subscriptions. Marsh. on Ins. B. 1, ch. 4, § 4, p. 116, or Condry's Ed., p. 146.

In the case before us, it is said, that the clause in the policy, as to prior and subsequent insurances, differs essentially from the like clause in marine policies. I have looked at some of the printed forms of policies against fire, in the books, but have not discovered any such clause. There is no direct evidence, to show that the policies made by the Chatham and Ætna offices were similar to this. Whether they are or not, the parties in this action must be governed by the contract they have made. That is express. Suppose the plaintiff had not received anything from the other offices; could he recover the whole amount of the defendants' subscription, provided his loss was equal to the amount? In a policy not containing the clause referred to, the plaintiff would be entitled to recover the sum insured, leaving the defendants to seek contribution from other insurers. Here there is a stipulation against that course, in very explicit language: "The insured shall not, in case of loss or damage, be entitled to demand or recover on this policy, any greater portion of the loss or damage sustained, than the amount insured bears to the whole amount insured on the property." The defendants did not intend to be liable for the whole of their subscription in the first instance, and then seek indemnity by way of contribution. If, notwithstanding this clause, the defendants should voluntarily pay the whole amount of their subscription, towards the plaintiff's loss, I do not perceive on what ground they could claim contribution. The answer to such a claim would be, that they paid in their own wrong; and *volenti non fit injuria*. If there is redress, it must be against the party who received more than he was entitled to demand. The principle of contribution can only be enforced where the party paying was under a legal obligation to pay. If the policies of the Chatham and Ætna companies are similar to this, the defendants

have no concern with the amount paid by them. In that case, they acted for themselves; and if they have paid more than the plaintiff could by law recover, it was done voluntarily. In the present case, the amount of the plaintiff's loss is controverted. He claims much more than the defendants are willing to admit. The weight of evidence on this point may be contended for by the defendants; but still, it is a disputable fact. The Chatham and Ætna offices may have chosen to pay on the exhibition of the plaintiff's proof, in preference to a protracted litigation. They may have erroneously considered the damages much greater than they really were. They acted voluntarily, and for themselves. This was submitted to the jury, and they have passed upon it. The act of settling for themselves, raises a presumption that the different policies were alike; and that no claim for contribution was contemplated as against each other.

On the supposition that the policies of the Chatham and Ætna companies did not contain the clause in question, the plaintiff might recover the amount of their subscriptions, if necessary to satisfy his loss; and in such case, I apprehend, it would be competent for the defendants to show the plaintiff had received satisfaction. As indemnity can only be claimed, there is no right of action after it is obtained. If the policies of the Chatham and Ætna offices were such as to entitle the plaintiff to recover of them all of their subscription, if requisite to pay his loss, then their right to contribution against the defendants would be undoubted. The clause in the defendants' policy would not affect that question; but would apply, when they should be prosecuted by the plaintiff, so as to protect them against his claim beyond a ratable proportion of the loss. If the loss has been already recovered, and paid, the claim for a ratable proportion is necessarily extinguished. The Chatham and Ætna offices incurred no risk in making payment, provided the clause is not in their policies; because it is conceded by the defendants that the loss was at least equal to those payments. On this principle, the defendants are liable to contribute a portion to those companies. If the amount received was to be taken into consideration on the trial, the duty of the jury would have been to ascertain the whole amount of loss; and if it exceeded the sums paid, then, after deducting the payment, to find a verdict against the defendants for the balance, provided it did not exceed the proportion of the whole loss, which, according to the contract, the defendants ought to bear; and if the amount of the loss remaining unsatisfied was less than such ratable share of the whole loss, then the verdict should have been for such balance. In the action for contribution, an adjustment would be

made between the parties on these principles. In the view thus taken, I think that part of the judge's charge incorrect, which directed the jury not to take into consideration the payments made to the plaintiff, by the other insurance companies, provided those companies were aware of the existence of all the policies on the property at the time; and made the settlement solely with a view of discharging the plaintiff's claim against themselves. If the Chatham and Aetna companies were liable to the amount of their subscriptions, which I apprehend they were, unless protected by a clause, like that in the defendant's policy, their knowledge of other policies was immaterial. Whether they had knowledge or not, the plaintiff was entitled to recover against them; and if so, they had a remedy over against the other insurers. Neither can the fact that they settled to discharge the claim solely against themselves, defeat such remedy over if it appears they have not paid more than the loss sustained. Suppose those companies had settled under a belief that their proportion of the loss would be equal to the amount paid; and therefore did not, at the time, contemplate a recovery against others for a portion of it. This would not invalidate their right to claim contribution, when it is shown that they had paid more than their relative proportion. In this point of view, the charge was calculated to produce a result unfavorable to the defendants. The verdict was for the plaintiff; for how much does not appear; probably for the whole sum insured. A new trial should be granted if the Chatham and Aetna companies were legally bound to pay what the plaintiff received. But if those policies were like the one in question, the defendants can derive **no** benefit from the payments made. They should be put out of view on this trial; and if so, that part of the charge on which I have commented was incorrect as respects the plaintiff. The defendants have no cause to complain. It was allowing them the benefit of the payments, if the jury were satisfied of certain facts submitted to them; whereas, they should have been instructed not to regard the payments, if the policies subscribed by those companies bound them only to pay, in the first instance, a ratable proportion of the loss.

The question then is, what was the form of the Chatham and Aetna policies? Neither party has adduced any express testimony to this fact. On whom devolved the necessity of showing what those policies contained? Certainly not the plaintiff. His case was made out without this. He claims of the defendants the proportion they are bound to pay under their policy for the whole loss. They contend it has been paid by other companies. But to make that defense available, it must be shown either that the companies paid

in fact a sum of money which was received in full satisfaction of all the insurances; or that the amount paid by them was in pursuance of a policy which authorized such payment. The first is not pretended. As to the second, the court is left to conjecture. It is a fact on which the defense rests. There is no sufficient ground for presumption that those policies did not contain the clause in question. The defendants' policy contains it. Some of the forms in the books do not. We cannot assume the fact that the policies differed from the one in this case. I think it may rather be presumed they are alike. The settlement made between the plaintiff and the companies strengthens the presumption. They each deducted one-sixth. They certainly had no right to make that deduction if the loss exceeded the sums insured by them. The plaintiff claimed considerably more. It is not probable the plaintiff would have consented to a deduction of one-sixth, if the policies were so drawn as to allow him to recover the whole sum insured. Be this, however, as it may, I think the defendants ought to have shown the other policies were different, in order to avail themselves of the payments. The remainder of the charge is correct. If the loss was equal to all the sums insured, the plaintiff was entitled to the face of the policy. If less, to a proportion only. Whether the jury have found too much, or too little, is not before us. The motion for a new trial must be denied.

New trial denied.¹

7. OPTION TO REBUILD.

RUGER, C. J., IN WYNKOOP *v.* NIAGARA INSURANCE CO.

91 N. Y. 478. — 1883.

THE evidence showed that the house of the insured was struck by lightning on the 3d day of June, 1876, and tended to show that it was seriously injured. The defendant soon thereafter, under the option clause of the policy, elected to repair the injury and restore the house to its former condition. A carpenter was employed by

¹ When the property was insured independently by the mortgagee, the owner of the ground rents, and the lessee, and a loss having occurred, one of the insurers of the lessee replaced the property, it was held that the insurer replacing the property, though entitled to contribution from its co-insurers of the same interest could not resort to the insurers of the other interests; that to invoke contribution the insurance must be for the same person, upon the same subject-matter, and against the same risks. — *Conn. Fire Ins. Co. v. Ins. Co.*, 15 Ins. Law Jour. 615 (Va. Sup. Ct., Apr., 1886; not officially reported). See also *North Brit. and Mer. Ins. Co. v. Ins. Co.*, 5 Ch. D. 569.

it to make the repairs, and after about one day's labor the defendant informed the insured that it had completed the restoration; some time afterwards a mason was also employed to do work on the house and the insured was again informed that the repairs were finished. The insured always claimed that the repairs were insufficient, but declined to point out wherein the insufficiency consisted. After such attempted repairs were declared finished, and about the 26th day of August, 1876, the plaintiff's intestate duly made out and served proof of loss upon the defendant. * * *

The rights of the parties rested altogether in contract, and the defendant assumed the responsibility of performing it according to its terms, subject to the right of the insured to damages for any breach of performance. The defendant in case of liability arising against it upon its contract had an option as to the manner in which it would discharge such liability. One mode looked to the compensation of the insured by the payment of damages for his loss, and the other to the restoration of the subject of insurance to its former condition. It could not have been contemplated by the parties that both methods of performance were to be pursued. The selection by the defendant of one of these alternatives necessarily constituted an abandonment of the other. The election of the privilege of restoration involved the rejection not only of the right to discharge its liability by the payment of damages to the insured, but also of those provisions of the contract having reference to that method of performance. From the time of such election the contract between the parties became an undertaking on the part of the defendant to build or repair the subject insured and to restore it to its former condition, and the measure of damages for a breach of the substituted contract did not necessarily depend upon the amount of damages inflicted upon the house by the peril insured against. Those views have frequently been expressed by this court. In *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429, the company had availed itself of its option to restore the premises injured. Denio, J., said: "The contract then became one for rebuilding, and the obligation which looked to the payment of money became obsolete and inapplicable, and the case then became the same which it would have been if the contract had obliged the defendant simply to rebuild in case of loss." To similar effect are the cases of *Beals v. The Home Ins. Co.*, 36 N. Y. 522; *Heilmann v. Westchester F. Ins. Co.*, 75 Id. 9. * * *

¹ There is no option to the insurer to indemnify by rebuilding or repairing unless the policy so provides. — *Wallace v. Co.*, 4 La. 289.

8. DIVISIBILITY OF LOSS.

MCGOWAN *v.* PEOPLE'S MUTUAL FIRE INSURANCE CO.

54 VT. 211. — 1881.

TAFT, J. — The policy in question contained the following provision: "Whenever any one hereinafter insured shall alienate conditionally, by mortgage, his policy shall be void, unless he shall make a representation thereof in writing to the secretary, stating the amount, and to whom mortgaged, and the cash value of lands and buildings separately, and when approved by a director, the secretary shall enter a minute thereof on the record of said policy and forward to the insured a certificate thereof."

The assured mortgaged the real estate covered by the policy on the 24th day of July, 1878; the property was destroyed by fire on the 18th day of the following month; notice of the mortgage was given to the secretary on the 12th day of September afterwards — fifty days after its execution, and twenty-five days after the fire. The orator contends that he was entitled to a reasonable time to represent the mortgage to the company. He delayed for twenty-five days and until the destruction of the property. He could have communicated with the secretary daily. There is much good sense in saying that upon the execution of the mortgage the policy was void, as though the contract had read "*until* he shall make a representation," etc., instead of "*unless* he shall make," etc. But construing the clause most favorably to the assured, and giving it the construction contended for, we think the delay of twenty-five days, when he could have communicated with the company daily, an unreasonable one. * * * The policy therefore, by reason of the execution of the mortgage by the orator, became void; but the orator claims that it was valid as to the personal property, situated in the dwelling-house, which was the first item insured by the policy.

This is a question of great practical importance, as a large proportion of insurance contracts embrace more than one item of property insured. The decisions are apparently conflicting; but we think are easily reconciled by referring to the plain principles which should govern them. The general rule, "*void in part void in toto*," should apply to all cases where the contract is affected by some all-pervading vice, such as fraud, or some unlawful act, condemned by public policy or the common law; cases where the contract is entire and not divisible; and all those cases where the matter that renders the policy void in part, and the result of its being so rendered void, affects the risk of the insurer upon the other items in the contract. Keeping these rules in mind, the lead-

ing cases upon this subject can all be reconciled. A recovery should be had in all these cases where the contract is divisible; the different properties insured for separate sums; and the risk upon the property, which is claimed to be valid, unaffected by the cause that renders the policy void in part. Such are the cases of *Howard v. Cornick et al.*, 24 Ill. 455; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164; *Clark v. New Eng. M. F. Ins. Co.*, 6 Cush. 324; *Date v. Gore District M. F. Ins. Co.*, 14 Up. Can. C. P. 548; *Phoenix Ins. Co. v. Lawrence et al.*, 4 Met. (Ky.) 9; *Lochner v. Howe M. Ins. Co.*, 17 Mo. 247; *Koontz v. Hannibal S. & I. Co.*, 42 Mo. 126; *Cucullu v. Orleans Ins. Co.*, 18 Mar. (La.) 11. In *French v. Chenango M. Fire Ins. Co.*, 7 Hill, 122, the policy covered a building and its contents, and was held void as to the former by omitting to state the existence of a plough shop within ten rods of the property insured; but valid as to the contents. Upon what principle a policy could be held void in part and valid in part, for a misdescription of adjacent buildings, affecting the various items of the risk in equal degree, we are unable to determine. The case was substantially overruled by *Wilson v. Herkimer Co. M. Ins. Co.*, 6 N. Y. 53.

The cases following have held the contracts entire, indivisible, and no recovery could be had upon them. *Hinman v. Hartford Fire Ins. Co.*, 36 Wis. 159; *Associated F. Ins. Co. v. Assum*, 5 Md. 165, *Bowman v. Franklin Ins. Co.*, 40 Md. 620; *Fire Association v. Williamson*, 26 Penn. St. 196; *Gottzman v. The Penn. Ins. Co.*, 56 Penn. St. 210; *Bleakley v. Niagara D. M. Ins. Co.*, 16 Grant's Ch. Rep. U. C. 198.

In the case at bar the whole property was insured for eight hundred and seventy-two dollars, divided into specific items, but one premium was paid, and one premium note given. We think the authorities justify us in holding that the contract was an entire one; separate and distinct only so far as to limit the extent of the risk assumed by the company on each kind of property. The cost of the insurance was to be assessed upon the premium note, and the company had a lien upon the buildings insured, as security for the payment of any assessment which might be made upon the note. The encumbrance upon the buildings affected the security the company held for the payment of assessments which might be laid upon the note; thus the risk upon the personal property was affected by the cause which rendered the policy void as to the real estate. We think for these two reasons that the whole policy was void. *Friesmuth v. Agawam M. F. Ins. Co.*, 10 Cush. 587; *Brown v. People's M. Ins. Co.*, 11 Ib. 280; *Lovejoy v. Augusta M. F. Ins. Co.*, 45 Me. 472; *Gould v. York Co. M. F. Ins. Co.*, 47 Me. 403; *Day v. Charter*

Oak F. & M. Ins. Co., 51 Me. 91; *Barnes v. Union M. F. Ins. Co.*, Ib. 110.

The views expressed render it unnecessary to pass upon the questions in the case as to proofs of loss, fraud, and false swearing. The *pro forma* decree of the Court of Chancery is reversed, and cause remanded with the mandate that the bill be dismissed.

VEAZEY, J., did not sit, having heard the case on demurrer.¹

9. VALUED POLICIES.

INSURANCE CO. *v.* BUTLER.

38 OHIO ST. 128. — 1882.

A FIRE insurance policy was issued to plaintiff for \$800 on her dwelling-house and \$400 on her barn, by which the company agreed "to make good unto the said assured, * * * all such loss or damage, not exceeding in amount the several sums insured," etc. The application, made a part of the policy, contained a presentation that "the above description and diagram contains a full and accurate description of the buildings and property insured, and the insurance on the buildings does not exceed two-thirds their actual cash value." The dwelling was totally destroyed by fire.

McILVAINE, J. — Whether the policy of insurance in this suit is valued or open, is the sole question in this case.

A policy of insurance is essentially a contract for indemnity in case of loss. Wager policies are contrary to public policy. The insured must have an interest in the subject of the insurance — an interest in its preservation. In case of loss, his contract rightfully entitles him to compensation — nothing more. The reason upon which this principle rests, is the prevention of fraud and crime, by removing all inducement and temptation to commit them, which would naturally arise from the great disparity between the consideration paid and the indemnity received by the insured. This disparity, however, does not amount to inadequacy or even a suspicion of fraud: because of the supposed remoteness of the contingency of loss; nevertheless its existence requires the utmost good faith on the part of the insured. While these considerations do not, in the

¹ See also *Loomis v. Ins. Co.*, 77 Wis. 87; *McQueeny v. Ins. Co.*, 52 Ark. 257.

"Whatever the rule may be elsewhere, it is settled in this state that where insurance is made on different kinds of property, each separately valued, the contract is severable, even if but one premium is paid and the amount insured is the sum total of the valuations." — *Pratt v. Ins. Co.*, 130 N. Y. 206, 221.

least, exempt the insurer from liability on his contract, they do show that in the absence of a contract to the contrary, the amount of recovery on a policy of insurance should be limited to the actual loss sustained by the assured on account of the risk against which the policy was taken. In other words, a policy of insurance must be regarded as an open one, unless it appears to have been the intention of the parties to the policy, upon a fair and reasonable construction of its terms, to value the loss, and thereby fix, by contract, the amount of recovery.

Mr. Wood, in his treatise on fire insurance, § 41, says: "Valued policies are those in which both the property insured and the loss are valued, and which bind the insurer to pay the whole sum insured, in case of total loss. They may be said to be policies in which the insurer himself, at the time of making the policy, assesses the damages in case of total loss, unless fraud, inducing an over-valuation on the part of assured, is established." And further along in the same section he says: "If there is anything in the policy that clearly indicates an intention on the part of the insurer to value the risk and the loss, in whatever words expressed, the policy is valued, otherwise it is open." Again, "No particular form of expression is necessary; the *intention* of the parties, gathered from the whole instrument, must determine the matter." *Fuller v. Boston, etc., Ins. Co.*, 18 Pick. 523.

It has been decided that a policy of a company whose charter limited its liability to a certain proportion of the actual value of the property insured, which refers to the value of the property as stated in the application of the insured, is a valued policy. 10 Cushing, 551. Other cases go so far as to hold, generally, that a policy which refers to the valuation of the property as it appears in the application which is made a part of the policy, is a valued one. 1 Allen, 63; 100 Mass. 475.

Without expressing an opinion as to the soundness of such construction when nothing further appears in the policy, we are satisfied that the policy before us, which contains the further stipulation, that "said Farmers' Insurance Company hereby agrees to make good unto the said assured, his heirs, executors, administrators, or assigns, all such loss or damage not exceeding in amount the several sums insured, as shall happen by fire or lightning to any of the aforesaid property, from the 28th day of March, 1873, at 12 o'clock at noon, to the 28th day of March, 1878, at 12 o'clock at noon, and to be paid ninety days after due notice *and proofs* of the same shall have been made by the assured and received at this office, with the terms and provisions of this policy," shows that it

was not intended by the insurer to make the sum assured the measure or value of the damages, although the loss might be total. Proofs of loss or damage here required as a condition precedent to the payment, refer to cases of total as well as partial losses. The amount of liability on the policy was thus left open to inquiry, limited, however, by the amount of insurance named in the policy.

The Court of Common Pleas, therefore, erred in rejecting testimony offered by the defendant below as to the amount of actual loss. And the District Court erred in affirming the judgment of the Common Pleas.

Judgments reversed and cause remanded.¹

OSHKOSH GAS LIGHT CO. *v.* GERMANIA FIRE
INSURANCE CO.

71 Wis. 454. — 1888.

FEBRUARY, 8, 1885, the defendant issued to the plaintiffs its policy of insurance, whereby it insured the plaintiffs against loss by fire to the amount of \$750 in several sums, upon six separate pieces of property, some of which were real estate, and some personal property, including "\$180 on the frame storehouse building and shed adjoining, including scales." By the terms of the policy, "\$15,000 concurrent insurance" was "permitted," in the aggregate, on the whole property covered by the policy. "There was other insurance upon this property, amounting, in the aggregate, to

¹ See also *Cushman v. Ins. Co.*, 34 Me. 487.

In *Harris v. Eagle Fire Co.*, 5 Johns. 368, the policy insured "380 kegs of manufactured tobacco, worth 9,600 dollars." Of this tobacco, 157 kegs were totally destroyed by fire. The court said: "The case states, that among the articles insured there were 380 kegs manufactured tobacco, worth 9,600 dollars; this was the rate at which the tobacco was estimated, in making up the 20,000 dollars, the amount of the insurance. The premium was paid according to this valuation; and the 157 kegs which were lost, are expressly stated *to be of the same kind and quality* as the whole 380 kegs. We have, therefore, an infallible rule by which to estimate the several and distinct value of each keg of tobacco. But it was said on the argument, that admitting this to be a valued policy, it would make no difference, for it was only in case of a total loss, that there was any distinction between an open and a valued policy; that in case of a partial loss, the like inquiry into the true amount of such loss is to be made, whether the policy be of the one sort or the other. This is undoubtedly true, when ascertaining the extent of damage which the particular subject has sustained, and when there was not an absolute destruction of the subject. But where there is an actual loss of any article, distinctly valued in the policy, that valuation, I apprehend, must govern all cases."

\$11,250." December 18, 1885, a fire occurred, as shown by the evidence and found by the jury, wholly destroying "the frame store-house building and shed adjoining, as well as the scales, and also damaged slightly some of the other property." The aggregate amount of insurance upon the property so destroyed at the time of the fire was \$2,700, in seven different companies, including the defendant company, which carried one-fifth of the risk thereon. The nature of the defense will appear from the opinion. On the trial, August 18, 1887, the jury returned a verdict of \$220.63. From the judgment entered thereon the defendant appeals.

CASSODAY, J. — 1. Upon the verdict of the jury it must be assumed that the building mentioned was wholly destroyed by the fire. At the time of such destruction it was insured in seven different companies, in the aggregate \$2,700, one-fifteenth of which was in the defendant company. The evidence tended to show that the value of the building at the time of the fire was about \$1,200. The defendant concedes that, if it is liable at all, it should pay its proportionate share of the true value of the building, but insists that it is not bound to pay the amount specified in the policy. The contract of insurance was made under a statute which declared that "whenever any policy of insurance shall be written to insure any real property, and the property insured shall be wholly destroyed without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed." § 1943, R. S. Under this statute it is settled by frequent adjudications that the actual value of such real estate when insured or destroyed, and the consequent *actual* loss to the insured, is wholly immaterial. *Reilly v. Franklin Ins. Co.*, 43 Wis. 449; *Thompson v. Citizens' Ins. Co.*, 45 Wis. 388; *Cayon v. Dwelling House Ins. Co.*, 68 Wis. 515, 516. This is the necessary result of the language of the statute making "the amount of the insurance written in such policy" conclusive between the parties to the contract, not only as to "the true value of the property *when* insured," but also as to "the true amount of loss and measure of damages when destroyed."

The statute must be regarded as a part of the contract of insurance, and the amount written in the policy as liquidated damages agreed upon by the parties conclusively in such contract. The several concurrent policies were each written with the consent of the respective companies. This being so, the aggregate amount of such insurance written in the several policies is the value of such property as stipulated in each contract, and hence, as between the parties,

must be regarded as conclusive, not only as to "the true value of the property when insured," but also as to "the true amount of loss and measure of damages when destroyed." This must be so, or the statute would be wholly ineffectual whenever there is more than one policy on the same property. And this is so notwithstanding other clauses in the policies inconsistent therewith.¹

The result is that the exceptions to such portions of the charge as, in effect, directed the jury that in case they found the building to have been wholly destroyed, then the plaintiffs were entitled to recover the full amount written in the policy, must be overruled. * * *

The judgment of the County Court is affirmed.²

10. LIMITATION OF TIME TO SUE.

FIELD, J., IN RIDDLESBARGER *v.* HARTFORD INSURANCE CO.

7 WALL. 386. — 1868.

By the demurrer to the replication two questions are presented for our determination: *First*: whether the condition against the maintenance of any action to recover a claim upon the policy, unless commenced within twelve months after the loss, is valid. * * *

The objection to the condition is founded upon the notion that the limitation it prescribes contravenes the policy of the statute of limitations. This notion arises from a misconception of the nature and object of statutes of this character. They do not confer any right of action. They are enacted to restrict the period within which the right, otherwise unlimited, might be asserted. They are founded upon the general experience of mankind that claims, which

¹ The policy in suit contained, among other clauses, the following: "In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the insured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, whether by specific or floating policies."

² The reasons leading to the adoption of valued policy statutes and the objects they were intended to accomplish are stated in *Insurance Co. v. Leslie*, 47 Ohio St. 409, 413-14. The constitutionality of these statutes, which was attacked upon the ground that they "take away a fundamental right" and preclude "a judicial inquiry of liability on policies of fire insurance by a conclusive presumption of fact," was upheld in *Orient Ins. Co. v. Dagg*, 172 U. S. 557. An overvaluation by the insured under a valued policy, unless made fraudulently,

are valid, are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth. The policy of these statutes is to encourage promptitude in the prosecution of remedies. They prescribe what is supposed to be a reasonable period for this purpose, but there is nothing in their language or object which inhibits parties from stipulating for a shorter period within which to assert their respective claims. It is clearly for the interest of insurance companies that the extent of losses sustained by them should be speedily ascertained, and it is equally for the interest of the assured that the loss should be speedily adjusted and paid. The conditions in policies requiring notice of the loss to be given, and proofs of the amount to be furnished the insurers within certain prescribed periods, must be strictly complied with to enable the assured to recover. And it is not perceived that the condition under consideration stands upon any different footing. The contract of insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses. And it is not an unreasonable term that in case of a controversy upon a loss resort shall be had by the assured to the proper tribunal, whilst the transaction is recent, and the proofs respecting it are accessible. * * *

The validity of the limitation stipulated in conditions similar to the one in the case at bar, has been elaborately considered in the highest courts of several of the States, *Peoria Ins. Co. v. Whitehill*, 25 Ill. 466; *Williams v. Mutual Ins. Co.*, 20 Vermont, 222; *Wilson v. Aetna Ins. Co.*, 27 Id. 99; *N. W. Ins. Co. v. Phoenix Oil Co.*, 31

is to be deemed a matter of opinion and cannot affect the recovery. *Cushman v. Co.*, 34 Me. 487, 495; *Vergeront v. Co.*, 86 Wis. 425, 426.

As to what will constitute a total loss under a valued policy, it was held in *Havens v. Ins. Co.*, 123 Mo. 403, that where a mill and machinery were insured for \$8,400 and were destroyed by fire, except machinery worth \$380, which had been removed for repairs, the loss was total and the valuation in the policy must be paid less a deduction of \$380. So, too, in *German Ins. Co. v. Eddy*, 36 Neb. 461, the loss was held to be total where only the brick walls of the insured building were left standing after the fire, and so badly injured that they would have to be taken down. If, however, the insured were to use the brick to rebuild, the insurer would be entitled to a deduction for the value of such brick.

Penn. St. 449; *Brown and Wife v. Savannah Ins. Co.*, 24 Georgia, 101; *Portage Ins. Co. v. West*, 6 Ohio St. 602; *Amesbury v. Bowditch Ins. Co.*, 6 Gray, 603; *Fullam v. New York Ins. Co.*, 7 Gray, 61; *Carter v. Humboldt*, 12 Iowa, 287; *Stout v. City Ins. Co.*, Id. 371; *Ripley v. Etna Ins. Co.*, 29 Barbour, 552; *Gooden v. Amoskeag Co.*, 20 N. H. 73; *Brown v. Roger Williams Co.*, 5 Rhode Island, 394, 7 Id. 301; *Ames v. New York Ins. Co.*, 4 Kernan, 253; and has been sustained in all of them, except in the Supreme Court of Indiana, *The Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Indiana, 443, which followed an adverse decision of Mr. Justice McLean in the Circuit Court for the district of that State, *French v. Lafayette Ins. Co.*, 5 McLean, 461. Its validity has also been sustained by Mr. Justice Nelson in the Circuit Court for the District of Connecticut, *Cray v. Hartford Ins. Co.*, 1 Blatchford, 280. * * *

HART v. CITIZENS' INSURANCE CO.

86 Wis. 77. — 1893.

THE plaintiff appeals from a judgment in favor of the defendant.

WINSLOW, J. — The action is upon a policy of insurance issued by defendant, November 11, 1890, upon plaintiff's dwelling-house. There is no dispute as to the facts. The house was burned March 5, 1891. Proofs of loss were served May 1, 1891, being within the time required by the policy. The defendant refused payment May 9, 1891, and plaintiff commenced this action May 3, 1892, nearly fourteen months after the fire.

The policy contained provisions requiring immediate notice of loss, proofs within sixty days after the fire, examination of the assured under oath if desired, and appraisal in case of disagreement as to amount of loss; also the following: "This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. No suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity until after full

¹ Contra, *Miller v. Ins. Co.*, 54 Neb. 121.

compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

It was held by the Circuit Court that the action was barred because not commenced within twelve months next after the date of the fire, and plaintiff appeals.

It is well settled that a clause in a contract limiting the time within which an action may be commenced thereon to a time shorter than that allowed by the statute of limitations is valid. The question here is whether the expression "twelve months after the fire" means what it says or something else. It is to be noticed that the parties here have not used the expression "after the loss occurs." Had this been the language used, it might reasonably be claimed, upon authority, that the "loss occurs," not at the date of the fire, but when the loss is ascertained and established and the right to bring an action exists. The decisions in favor of this doctrine are numerous. *Steen v. Niagara F. Ins. Co.*, 89 N. Y. 315; *Spare v. Home Mut. Ins. Co.*, 17 Fed. Rep. 568; *Chandler v. St. Paul F. & M. Ins. Co.*, 21 Minn. 85; *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507; *Miller v. Hartford F. Ins. Co.*, 70 Iowa, 704; *German Ins. Co. v. Fairbank*, 32 Neb. 750; *Barber v. Fire & M. Ins. Co.*, 16 W. Va. 658.

There are, however, many decisions to the contrary. *Chambers v. Atlas Ins. Co.*, 51 Conn. 17; *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92; *Fullam v. New York Union Ins. Co.*, 7 Gray, 61; *Glass v. Walker*, 66 Mo. 32; *Bradley v. Phoenix Ins. Co.*, 28 Mo. App. 7; *Virginia F. & M. Ins. Co. v. Wells*, 83 Va. 736; *Peoria Sugar Refining Co. v. Canada F. & M. Ins. Co.*, 12 Ont. App. 418; *Blair v. Sovereign Ins. Co.*, 19 N. S. 372; *Travellers' Ins. Co. v. California Ins. Co.*, 1 N. Dak. 151; *Schroeder v. Keystone Ins. Co.*, 2 Phila. 286.

Other cases, bearing more or less directly upon the question, might be cited upon either side of the proposition. It seems apparent that it can hardly be said that the great weight of authority is on either side. It is a case where there are two directly opposing lines of authorities, both very respectable in numbers and weight. It was claimed by appellant that this court had substantially approved of the affirmative view of the proposition in *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472, and *Black v. Winneshick Ins. Co.*, 31 Wis. 74. Examination of these cases shows that this court expressly declined to pass upon this question. The principle laid down in them is simply that if the insurance company, by its acts, induces the insured to suspend his proceedings and delay action on the policy, the time elapsing during such delay so caused should not be reckoned as a part of the time limited for the bringing of the action. It is an application of the familiar principle of estoppel.

Doubtless the tendency of so many courts to construe the "loss" as meaning the time when liability was fixed, induced many insurance companies to substitute the word "fire," as in the policy before us. It would seem as if the phrase "twelve months next after the fire" was susceptible of but one meaning; yet the courts have disagreed upon this question also. In the following cases it has been held that the word "fire" is to be construed as meaning, not the date of the fire, but the time when liability is fixed and an action accrues to the insured; *Friezen v. Allemania F. Ins. Co.*, 30 Fed. Rep. 352; *Hong Sling v. Royal Ins. Co.*, 7 Utah, 441; *Case v. Sun Ins. Co.*, 83 Cal. 473. On the other hand, the following cases hold that the limitation begins to run from the date of the fire: *Steel v. Phenix Ins. Co.*, 47 Fed. Rep. 863; *State Ins. Co. v. Meesman*, 2 Wash. 459; *McElroy v. Continental Ins. Co.*, 48 Kan. 200; *State Ins. Co. v. Stoffels*, 48 Kan. 205; *King v. Watertown Ins. Co.*, 47 Hun, 1.

It is noticeable that all of the three cases above cited which hold that "fire" means the time when liability is fixed, rely for authority upon the cases which construe the word "loss" as having such meaning. No attention seems to have been given to the fact that the word "fire" has been substituted for the word "loss." It is also noticeable that in the case of *Case v. Sun Ins. Co.*, 83 Cal. 473, the facts were that the insured was compelled to submit to examination by the company, and to produce books, bills and invoices, and that he complied with these requirements as rapidly as he was able, but was unable to fully comply therewith until more than thirteen months after the fire, or a month after the expiration of the time limited for bringing suit. Here, certainly, was a clear case of estoppel. The company, by its own acts, had postponed the time when a cause of action accrued until after the limitation had run, and should clearly be denied the right to rely upon the limitation. See, to this effect, *Thompson v. Phenix Ins. Co.*, 136 U. S. 287. The cases of *Friezen v. Allemania F. Ins. Co.*, 30 Fed. Rep. 352, and *Hong Sling v. Royal Ins. Co.*, 7 Utah, 441, are, however, direct authorities to the effect that "twelve months after the fire" means twelve months after the liability is fixed. The argument in support of this view is briefly that all clauses of the policy must be construed together; that there are clauses which necessitate the making of proofs, the submission of the assured to examination if required, the production of books and papers, and the submission of the question of the amount of loss to appraisers, all of which things will consume time; and, furthermore, the loss not being payable until sixty days after the amount is fixed, it may

happen that more than twelve months may elapse after the date of the fire before the company can be sued; and thus the plaintiff's action may be cut off entirely if a literal meaning is to be given to the words. The deduction is that the parties cannot have meant what they said in the clause under consideration, but must have meant something else, which they did not say.

We cannot assent to this line of reasoning. It does violence to plain words. It smacks too strongly of making a contract which the parties did not make. It construes where there is no room for construction. Plain, unambiguous words which can have but one meaning are not subject to constructions. "Twelve months next after the fire" has one certain meaning and but one. It can have no other. It may well be that the insurer may by his acts waive the limitation, or estop himself from insisting on it, as held in the cases of *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472; *Black v. Winneschick Ins. Co.*, 31 Wis. 74, and *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287; but the invocation of this principle does no violence to the contract of the parties. There is no element of estoppel present here, however. The defendant company have done nothing which has induced the insured to suspend proceedings or delay his action. They notified him at once on the receipt of his proofs that they denied liability. They did not require him to do anything. He had nearly ten months in which to bring his suit. By failing to do so he must be held to be barred by his contract.

The provision of § 1975, R. S., to the effect that no insurance policy shall contain a provision that no action or suit shall be brought thereon, is not applicable, because the clause under consideration is plainly not such a provision.

By THE COURT. — Judgment affirmed.¹

¹ "What right has any tribunal to find hidden somewhere in the contract a privilege to have the full time to sue after the cause of action has accrued, when the policy gives it only from the time the loss occurs? There are two distinct provisions—one that the insured shall not sue before a certain time, another that he shall not sue after a certain time. These do not clash. They merely necessitate the construction that the intention was to give the insured such period in which to maintain his action after he could sue as would be left after deducting from the time limited the time which must elapse before the right to sue could accrue. But we find in these cases this extraordinary reasoning: They assert that this doctrine will often kill the action before it could have life. The answer is short and simple. Every limitation in a contract is void which does not leave the plaintiff a reasonable time in which to sue after his right to sue has become perfect. * * * If other provisions of the policy make it appear that in every case a reasonable time will not be left after the right to sue has become perfect, the limitation is void. If, acting in good faith,

III. TERMS OF THE MARINE INSURANCE CONTRACT.

I. ATTACHMENT OF THE RISK.

HAUGHTON AND OTHERS v. EMPIRE MARINE INSURANCE COMPANY (LIMITED.)

L. R. 1 EX. 206. — 1866.

DECLARATION on a valued policy of insurance on the ship Urgent, "lost or not lost, *at and from* Havana to Greenock," alleging that the ship when *at* Havana, and after the commencement and during the continuance of the risk, sustained injury by the perils insured against.

CHANNELL, B. — This was an action on a valued policy on the ship Urgent, lost or not lost, *at and from* Havana to Greenock, and the question for us to determine is, whether or not the risk had attached at the time when the damage occurred. A verdict was entered at the trial for the plaintiffs, and a rule has been obtained by the defendants to enter a nonsuit pursuant to leave reserved. The facts are before us on the judges' notes and in certain documents admitted in evidence, and we are to be at liberty to draw inferences of fact. It appears that the Urgent, having arrived off Havana, the captain engaged the services of a steam-tug and a pilot for the purpose of taking her to a clear anchorage. She was towed into the harbor, past the point where she ultimately discharged her cargo, to a point at the head of the harbor, called the Regla Shoal. There she grounded, and received damage from the anchor of another ship. In my opinion she was at that time at Havana, and consequently the risk under the policy had attached. The damage occurred *at* Havana, geographically speaking, and there is nothing which, to my mind, shews that the parties, at the time this policy was underwritten, contemplated any other meaning of the word "*at*." All the limitation which the law appears ever to have imposed as to the time of the commencement of the risk in such a case is, that the ship should arrive at the port *at* which she is insured in a state of sufficient repair or seaworthiness to be enabled

and with all proper diligence, it transpires in any particular case that other conditions of the policy to be complied with as conditions precedent to a right of action could not be performed in time to leave a reasonable time thereafter in which to sue, the limitation is inoperative in such a case. * * * Thus the insured is fully protected by the application of known and established principles. The contract is construed as it is written, and the time when the limitations begin to run, if at all, is fixed, and not uncertain." — *Travelers' Ins. Co. v. Ins. Co.*, 1 N. Dak. 151.

to be there in safety. See *Parmeter v. Cousins*, 2 Camp. 235, and *Bell v. Bell*, 2 Camp. 475, in the latter of which cases the ruling of Lord Ellenborough, C. J., at *Nisi Prius*, was upheld by the court in banc. Here, however, there seems to be no doubt that the ship was really in the harbor in good safety, and the loss occurred from a peril in the harbor, and in no way from any injuries she had received before her arrival. The ship being insured while at Havana is evidently, in the absence of any provision to the contrary, insured all the time she is there, and, therefor, the risk commences on her first arrival, as put by Lord Hardwicke in *Motteaux v. London Assurance Company*, 1 Atk. 545.

Unless, therefore, we can say that her first arrival at the port is when she casts anchor there, instead of when she enters the port, our judgment must be for the plaintiffs. In many cases the nature of the port may be such that the two events may be identical. There may be nothing to shew the arrival till the vessel casts anchor. But here we have evidence as to the port of Havana which is sufficient, in my judgment, to shew that the arrival was before casting anchor. It has been argued that the first arrival, which must be no doubt in good safety, must be identical with the mooring in good safety usually named in outward policies. But I think we cannot construe the terms of one contract by reference to those of another not referred to in it. And it is clear that there is no usage that the duration of the outward and homeward policies should not overlap, because the outward policy usually extends to twenty-four hours after the vessel is moored in good safety. During those twenty-four hours there is no question that there is a double insurance, and, therefore, I see no ground for saying that the parties contracted subject to any usage that such a policy should not attach until the previous one had determined. If they had wished to make such a condition it might easily have been done; or if, having in view any special dangers, as shoals or the like, within the port of Havana, they had chosen to make the risk date from the vessel being moored in safety, they would have done so; but as it stands it is from the first arrival, which, as a matter of fact, I think to be on her entering the port. My judgment is, therefore, for the plaintiffs, that the rule be discharged.

[Opinion also by PIGOTT, B.]

2. TERMINATION OF THE RISK.

WHITWELL *v.* HARRISON.

2 EXCH. 127. — 1848.

ALDERSON, B. — This was an action on a policy of assurance, on the ship Governor Halket, at and from Quebec to her port of discharge in the United Kingdom. By the charter-party of the vessel, which was put in, the vessel was chartered to take on board a cargo of timber at Quebec, and to proceed therewith to Wallasey Pool, in the river Mersey, or as near thereto as she could safely get, and there discharge her cargo.

It appeared at the trial that the vessel sailed from Quebec on the 23d of July, 1845, and arrived in the Mersey on the 4th of September, and came to an anchor at the Bell Buoy in that river. The next morning she was towed by a steam-boat, and came abreast of Wallasey Pool; but being unable to get into Wallasey Pool, by reason of her too great draft of water, the captain anchored her there, and proceeded to Liverpool to report the vessel, and engaged lumpers to discharge the cargo at a fixed rate of payment, which was to include the expense of rafting the timber from the vessel into Wallasey Pool, and discharged his crew, as was usual on a ship's arrival at Liverpool, altogether. He then proceeded to discharge the deck cargo, and afterwards a considerable portion of the other cargo, by the usual mode, at the stern port, from the hold of the vessel; and after occupying in this way several days, the ship being at anchor, on the 14th of September, fell over and sustained damage, the subject of the present action; and the question is, whether the underwriters were at the time of this accident off the policy, by reason of the vessel having been moored in safety twenty-four hours after her arrival at her port of discharge. It appeared in evidence, that the captain always intended ultimately to carry the vessel into Wallasey Pool, with as much of the cargo on board, as she could carry over the shallow part intervening between his original anchorage and the pool. But it was also clearly established that the discharge of the cargo was going on in due course, and that if the water were not sufficient, and no accident had occurred, the whole cargo would have been discharged in the place where the vessel was moored.

My Brother Rolfe held, under these circumstances, that the underwriters were not liable and we think he was right in so holding. Here the ship was bound to Wallasey Pool, or as near thereto as she could safely get, and it is clear that that was the intended place for the discharge of her cargo. The cases on this subject

are well collected in Mr. Hildyard's edition of Park on Insurance, vol. i, p. 73. We were referred in the argument to *Samuel v. The Royal Exchange Company*, 8 B. & C. 119; but this case is clearly distinguishable from it, because there the vessel had not arrived at the place where any part of her cargo was ever intended to be discharged; the vessel here had on the 5th of September arrived as near Wallasey Pool as she could safely get, and did actually begin to discharge her cargo accordingly, discharging her crew altogether, and leaving none of them on board for the purpose of further navigation. The case of *Brereton v. Chapman*, 7 Bing. 559, does not appear to us at all to affect this question. There the vessel was still in progress to the ultimate place for the discharge of her whole cargo, and all that was done was to put on board lighters a portion of her cargo, in order that the vessel might be enabled thereby without delay to proceed with them to the usual place of discharge. There the whole crew remained on board, and the vessel was in all respects really continuing her voyage. *Keyser v. Scott*, 4 Taunt. 660, and *Dalgleish v. Brooke*, 15 East. 299, are authorities showing rather that "the port of discharge" includes the whole port within which any portion of the cargo is usually, according to the custom of such port, taken out of the vessel. These are authorities going on a totally different principle, viz., that of the construction of a warranty from seizure in the port of discharge; but, if at all applicable to the present question, they go further than this case requires us to do. Upon the whole, we think that here the vessel had clearly arrived at her port of discharge, and was actually in the course of discharging her cargo, and had moored there twenty-four hours in safety before the accident occurred. The rule therefore must be discharged.¹

3. DEVIATION.

ENDICOTT, J., IN *BURGESS v. EQUITABLE MARINE INSURANCE COMPANY*.

126 MASS. 70, 78. — 1878.

It may be stated in general terms that the assured is protected by his policy, while the vessel pursues the usual and customary course of the voyage; but any departure from the course, or delay

¹ "The voyage is understood to be terminated when the vessel arrives at her port of destination, and has been moored there in safety for twenty-four hours." — *Gracie v. Marine Ins. Co.*, 8 Cranch, 75, 82.

in prosecuting it, without necessity or just cause, is a deviation and discharges the insurer, because another voyage has been voluntarily substituted for that which was insured. Whether the degree or period of the risk is increased, is unimportant, as the assured has no right to substitute a different risk. Whenever, therefore, there is a manifest departure from the course of the voyage, the assured must show that it was justified by the necessity of the case. *Stocker v. Harris*, 3 Mass. 409, 418; *Brazier v. Clap*, 5 Mass. 1; *Coffin v. Newburyport Ins. Co.*, 9 Mass. 436, 449; *Knettell v. Wiggin*, 13 Mass. 68.

In the case at bar, the alleged necessity arose from scarcity of bait. The plaintiff did not put on board, when the vessel sailed from Plymouth, enough for the entire trip. Squid had been plenty on the Banks during several years prior to 1874, and the plaintiff relied upon catching them there and using them for that purpose. They happened this season to be very scarce, and, after fishing three weeks, and nearly exhausting his supply, the master sailed for St. Peter's, over 100 miles distant, procured bait, and returned to the Banks after an absence of a week. It is to be observed, that this so-called necessity did not arise from any peril insured against in the policy, or ordinarily insured against in policies of insurance, and did not involve the safety of the vessel, or of any property on board; it had relation solely to the success of the fishing adventure and in this the defendant had no interest and had assumed no responsibility. We are of opinion that the claim of the plaintiff cannot be sustained; and that a necessity to justify the departure in this case cannot be found in the fact that, without going to St. Peter's for bait, the voyage would have failed to be successful or profitable to the plaintiff.¹

4. SEAWORTHINESS.

THEBAUD *v.* GREAT WESTERN INSURANCE CO.

155 N. Y. 516. — 1893.

O'BRIEN, J. — This was an action by the owners of a steamboat upon a policy of marine insurance. The issues in the case were tried before a jury, and the plaintiff recovered.

On the 28th of June, 1884, the steamer *Dos Hermanos* was in process of construction at the port of Philadelphia for use as a river

¹ See also *Thebaud v. Ins. Co.*, the next case.

steamer at or near Frontera, Mexico. She was not constructed or intended for use upon the open sea, but for service upon the rivers or other inland waters of the country where she was destined for use. On the day mentioned, the defendant issued to the plaintiff its policy of marine insurance upon this steamer to cover the voyage from Philadelphia, the place where it was built, to Frontera, Mexico, the place where it was intended for use. The policy related only to this voyage, part of which was, as all parties knew, upon the open sea. The defendant, by the terms of the policy, undertook to pay to the plaintiffs the sum of \$5,000 in case of loss upon this voyage, including what is known as the mechanic's risk while in port, meaning that at the time of the execution of the contract the steamer had not been completed, and, in fact, the voyage did not commence until the 27th of August thereafter. The policy, by its terms, indemnified the owners against loss from the usual perils of the sea covered by policies of marine insurance. The steamer, while on the voyage, was lost at sea, near the coast of North Carolina, on the night of the 13th of September, 1884.

The defense to the action may be arranged under three general heads: (1) That the steamer was not seaworthy, and, hence, that the implied warranty of seaworthiness, which it is insisted enters into and forms a part of every marine insurance upon a ship or vessel, was broken, and for that reason the plaintiff is not entitled to recover. (2) That in making the voyage there was a voluntary deviation from the usual course of the voyage from Philadelphia to Frontera. (3) That the steamer was not lost by the perils of the sea, or by any casualty covered by the terms of the policy, but in consequence of the unseaworthiness and unfitness of the vessel to make the voyage covered by the contract.

It is no doubt the general rule that in all contracts of marine insurance upon vessels there is an implied warranty that the subject of the insurance was at the time seaworthy, or, in other words, reasonably fit and capable of making the voyage. But in this case both parties knew that the vessel was not intended for service upon the open sea. She was not built or constructed for any such purpose, but, on the contrary, for the river service. Before the defendant entered into the contract the plans and specifications with reference to the construction of the *Dos Hermanos* had been submitted to its agents. They put the defendant in possession of all information concerning the character and construction of the craft. The defendant's marine engineer, who had had considerable experience assured the broker who took the risk "that she was built for the river trade, and he did not consider that she

was just the thing to attempt all weathers on the coast going around there, but if properly handled she might get there, provided she took the inland course so far as possible." The defendant thereupon concluded to write the risk, but exacted therefor double the usual premium for marine insurance on ordinary seagoing vessels. The steamer was not then completed, and, hence, the provision in the policy covering the mechanic's risk while in port, including the privilege of mechanics to work upon the vessel. Before starting on her voyage for Frontera two trial trips were taken by direction of the engineer, one up and one down the Delaware river. Neither of these trips, however, extended beyond the limits of the port of Philadelphia, and we do not understand that it is seriously claimed that these trips constituted a deviation from the usual voyage. They were merely preliminary in order to test the capacity of the vessel to make the voyage.

It was competent for the jury to find upon the evidence that the vessel was sufficiently provided with a crew and proper equipments. There is evidence tending to show that suitable precautions were taken before leaving Philadelphia for the ocean voyage to make her as seaworthy as a vessel of her class could be made; that her machinery was tried and the boilers inspected in the usual manner. The voyage was commenced, after leaving Philadelphia, by taking what is known as the inside course through the canals and bays, and the sea voyage was not actually commenced until she reached Fort Macon. Before reaching that point, however, it seems that an accident occurred to the vessel by a collision with a submerged stump in one of the canals, and, hence, there was a stop at Baltimore for repairs, where some further precautions were taken in order to protect the steamer from the perils of the sea voyage. Another stop was made at Norfolk, in order to procure a pilot to take her through the Chesapeake and Albemarle canal and other waters to Fort Macon. This was all inside navigation, and on reaching the point last mentioned it became necessary to go outside upon the open sea, and shortly afterwards the steamer was lost.

That the *Dos Hermanos* was not a seaworthy vessel, in the sense in which these terms are applied to seagoing vessels, is made quite clear by the evidence. It was undoubtedly competent for the jury to so find and for the court below to so decide, but in this court the question always is, upon an issue of this character, not upon which side the evidence preponderates, but whether there is any evidence to support the verdict. The parties knew perfectly well that the subject of the insurance was not a seagoing vessel, but, for the purposes of the trip the defendant was evidently willing to

take the risk, in consideration of the payment of a double premium, and after inspecting the vessel and acquiring full knowledge as to her construction and capacity. In view of the proof in the case tending to show what was done in order to fit the steamer for a voyage, we do not think it can be said in this court that the verdict of the jury is without any evidence to sustain it. Generally, the question as to whether a vessel, covered by a policy of marine insurance, was, or was not, at the time seaworthy, is one of fact for the jury. *Burges v. Wickham*, 3 Best & Smith, 669; *Clapham v. Langston*, 5 Best & Smith, 729; *Turnball v. Janson*, 36 L. T. R. 635; *Bouillon v. Lupton*, 15 C. B. (N. S.) 113. It is difficult to see how such a question from its very nature can in practice be determined otherwise, except, possibly, in a very clear case. But we do not regard that question as controlling, since, as already stated, both parties to the contract knew that the vessel was not a seagoing craft, or suitable for the navigation of the high seas, and, under the circumstances, the implied warranty upon which the defendant relies should not be construed in such a way as to be repugnant to the general purpose which the parties had in view at the time of the execution of the contract. We can discover no reason why the general rule applicable to risks in fire insurance policies does not apply to this case. As was said by this court in the case of *Bidwell v. Northwestern Ins. Co.*, 24 N. Y. 302: "Indeed it is not easy to perceive why an insurance company, by reason of the formal words or clauses (of a general and comprehensive nature), inserted in a policy intended to meet broad classes of contingencies, should ever be allowed to avoid liability on the ground that facts, of which the company had full knowledge at the time of issuing the policy, were then not in accordance with the formal words of the contract, or some of its multifarious conditions. If such facts are to be held a breach of such a clause, they are a breach *eo instanti* of the making of the contract, and are so known to be by the company as well as the insured. And to allow the company to take the premium without taking the risk would be to encourage a fraud." This rule, which is clearly applicable to express warranties in contracts of insurance, should, in reason and justice, be applicable to the implied warranty of seaworthiness in policies of marine insurance. That such is the well-settled rule in this court, with reference to express warranties in contracts of fire insurance, covering conditions with respect to which the underwriter had full knowledge, cannot now be questioned. *Van Schoick v. Niagara Ins. Co.*, 68 N. Y. 434; *Bennett v. Buchan*, 76 N. Y. 386; *McVally v. P. Ins. Co.*, 137 N. Y. 389; *Forward v. C. Ins. Co.*, 142 N. Y. 382; *Robbins v. Springfield Ins. Co.*, 149 N. Y. 477.

So we think the defendant must fail in defeating the recovery on the ground that there was a breach of the implied warranty of seaworthiness.

Whether the vessel was unseaworthy or not by reason of insufficient crew, or insufficient machinery, or the absence of a pilot during certain parts of the voyage, was under the circumstances, a question for the jury. The master of the vessel was himself a competent navigator, and whether after reaching Fort Macon and going into the open sea a pilot was usual and necessary for the rest of the voyage, is not a matter of law, but of fact, and the burden of proof showing negligence on the part of the plaintiff in this respect was, we think, upon the defendant. 1 Phil. on Ins. (5th ed.) §§ 712, 713.

Nor do we think it can be said, as matter of law, that there was such a deviation from the usual course of the voyage as to absolve the defendant from the obligations of the contract. A deviation is a voluntary and inexcusable departure from the usual course, and whether the departure amounts to a deviation must be determined by the motive, consequences and circumstances of the act. Hence, in its nature it is a question of fact. Where the circumstances are such as to leave no alternative to a reasonable and prudent man, exercising a sound judgment, and acting for the best interests of all concerned, it is not a deviation. 1 Arnold on Ins., §§ 151, 152. This proposition covers the argument in behalf of the defendant with respect to the inside voyage through canals and the stops made at the various points already referred to. We have already intimated that the trial trips cannot, in any just sense, be considered a deviation. Moreover, where a vessel is insured for a voyage "at and from" a port a reasonable time will be allowed while there engaged in the business of preparing for her voyage. *Snyder v. Ins. Co.*, 95 N. Y. 196; *Fernandez v. Ins. Co.*, 48 N. Y. 571.

The subject of the insurance in this case was a new craft, and the trial trips were reasonably necessary in order to determine before undertaking the voyage, whether the vessel was suitable for that purpose. Hence these trips may reasonably be regarded as a part of the preparation for the voyage.

The delay in commencing the voyage may also be imputed to the same cause, viz., the preparation necessary previous to sailing. The vessel was not completed when insured. The underwriter is not discharged by a delay incurred for the purposes of the voyage, though its absolute duration be very considerable. There must be a clear imputation of waste of time, and whether the delay be reasonable or not must be determined, not by any positive or arbitrary rule, but by the circumstances existing at the time. *Arnold v.*

Pacific Mut. Ins. Co., 78 N. Y. 16, 17. The defendant knew the condition of the vessel, and could form a judgment for itself as to the time when she would be ready to sail, and the insurance covered the chances of delay. On all the facts the jury had the right to find that the delay was not unreasonable.

The subject of the insurance was a non-seagoing vessel. It is reasonable to suppose that the parties intended that in making the voyage the open sea should be avoided as much as possible; hence, what was called the inside course was taken. Considering the character of the steamer and the purpose for which she was built, it cannot be said, as matter of law, that avoiding the sea until Fort Macon was reached, by the inside course, was a deviation from the usual course for vessels of that character. The ruling of the trial court submitting the question to the jury was quite as favorable to the defendant as it was entitled to. It was for the jury to say whether, under all the circumstances, the delay in the canal at night, the stop at Baltimore and Norfolk, the delay at Fort Macon and the anchoring off Smithville was a deviation.

The defense that the loss was not from the perils of the sea, but through inherent weakness, or defects, or faulty construction, presented upon the proofs a question of fact. On the part of the defendant it was claimed that the steamer foundered in a calm sea; while the plaintiffs insisted that she was lost in a northeast gale. The jury having sustained the plaintiff's contention, we cannot say that the verdict in that respect is unsupported by evidence. The question was for the jury, and the finding is not open for review here. It appears from the evidence that this vessel was ninety feet long, twenty-two feet beam, with from twelve to eighteen inches of freeboard, flat bottom, drawing about three feet of water. It is obvious that it would not require the severest tempest to sink such a craft. The risk was doubtless an unusual one, and for that reason an unusual premium was asked and obtained. It may be that the regular seagoing vessel would have weathered the gale. But the real question presented to the defendant, when the application for insurance was made, was whether this boat, as she was known by both parties to be, could make the transit from the port of departure to her destination. The defendant concluded to take that risk in consideration of a double premium, and to permit it now, after receiving the premium, to defeat a recovery, on the ground that she was not seaworthy in consequence of alleged defects of construction, known to it at the time of taking the risk, would scarcely be consistent with commercial morality.

It seems to us that the question was properly submitted to the

jury, and upon a careful examination of the exceptions taken during the trial, and to the charge, we are of opinion that none of them present any question of law that would warrant us in disturbing the verdict.

The judgment should, therefore, be affirmed.

All concur, except PARKER, Ch. J., not sitting.

Judgment affirmed.

BROWN, J., IN *BERWIND v. GREENWICH INSURANCE CO.*

114 N. Y. 231, 234. — 1889.

IN every case of marine insurance by a general policy covering all the perils of the sea, where the vessel insured is in port, there is an implied warranty that the vessel is seaworthy at the inception of the policy. It is a condition precedent to the risk, and if the vessel is not seaworthy, the policy does not attach. In an action to recover for a loss upon such a policy, where the fact of seaworthiness at the time of issuing the policy is shown, it is immaterial what the vessel's condition is thereafter during the voyage, as loss from unseaworthiness is among the perils insured against.

The plaintiffs, under such a policy, make out a *prima facie* case by showing seaworthiness at the inception of the risk. But in time policies there is implied warranty that the vessel will be kept in repair and made seaworthy at all times during the continuance of the risk, so far as that is reasonably possible, and this implied covenant imposes upon the insured the duty of active diligence to keep the vessel in good order and in a seaworthy condition. 2 Parsons on Maritime Law, 147, and cases cited in note on page 148, etc. It is doubtless true that, under a general time policy insuring against all perils of the sea, unseaworthiness subsequent to the attaching of the policy is a defense, the burden of proving which is upon the defendant, and that the plaintiffs need offer no proof thereof as a part of their case, but in the policy in suit loss from unseaworthiness is among the excepted risks, and it was, therefore, incumbent upon the plaintiffs to show that the loss arose from some of the perils covered by the policy; and to make out their case some evidence was necessary from which the jury could infer that the sudden sinking of the boat was not due to defective structure or condition.

5. PERILS INSURED AGAINST.

THAMES AND MERSEY MARINE INSURANCE CO.

(LIMITED) v. HAMILTON, FRASER & CO.

12 A. C. 484. — 1887.

THE policy sued on was a time policy on the steamship *Inchmarree*, for twelve months, from the 20th of August, 1883, to the 20th of August, 1884; and the subject-matter of insurance, "the hull, masts, spars, sails, boats, materials, and all stores, valued at £20,000; and machinery, shafting, propeller, boilers, and connections, including donkey-engine and boilers, pumps, and all connections, valued at £11,000."

The risks against which the insurance was effected are thus described: "And touching the adventures and perils which the capital stock and funds of said company are made liable unto by this insurance, they are, of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance, or any part thereof."

On the 2d of March, 1884, the *Inchmarree* was at anchor off Diamond Island, awaiting orders, and for the purposes of the voyage it was necessary to pump up the main boilers, by means of a donkey-pump and engine, in the usual way. A pipe led from the donkey-pump to the boilers, and at its junction with one of the boilers there was a check-valve, capable of being opened or closed with a screw which ought to have been kept open and clear when the boilers were being pumped up. This valve had either been left closed or had become salted up when the donkey-pump was set to work off Diamond Island, so that the water could not pass into the boiler. The consequence was, that when the donkey-pump was set to work the pipes and water chamber in the donkey-pump, and the air-chamber therein, became overcharged, and the water was forced up into the air chamber, which, in consequence, split, and the pump was thereby damaged.

It was admitted, for the purposes of the case, that the check valve was either allowed to remain closed or become salted up, by the negligence of one of the engineers, or was accidentally salted up without being noticed, though reasonable care was taken by the

engineers. It was also admitted that the closing or salting up, and accident were not due to ordinary wear and tear. The parties were unable to agree as to whether there was negligence in allowing the check valve to remain closed, or to become salted up; but as the plaintiffs contended that the defendants were liable, whether there was negligence or not, it was agreed to leave that question for trial (if material) after the decision of the case.

The questions stated for the opinion of the court were, whether the defendants were liable under the policy in respect of the loss, (1) if it could have been avoided by proper care, and occurred through negligence; (2) if it occurred accidentally, without negligence. The Queen's Bench Division gave judgment for the plaintiffs, and this judgment was affirmed by the majority of the Court of Appeal (Lindley and Lopes, L. JJ.), Lord Esher, M. R., dissenting.

LORD BRANWELL. — My Lords, I cannot agree with the judgment in this case. The donkey-engine was insured. The adventures and perils which the defendants were to make good, specified a great many particular perils, and "all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the aforesaid subject-matter of insurance, or any part thereof." Words could hardly be more extensive, and if the question, I ought to say a question on them, arose for the first time, I might perhaps give them their natural meaning, and say they included this case. But the question does not arise for the first time. It has arisen from time to time for centuries, and a limitation has always been put on the words in question.

Definitions are most difficult, but Lord Ellenborough's seems right: "All cases of marine damage of the like kind with those specially enumerated, and occasioned by similar causes." I have had given to me the following definition or description of what would be included in the general words: "Every accidental circumstance not the result of ordinary wear and tear, delay, or of the act of the assured, happening in the course of the navigation of the ship, and incidental to the navigation, and causing loss to the subject-matter of insurance." Probably a severe criticism might detect some faults in this. There are few definitions in which that could not be done. I think the definition of Lopes, L. J., in *Pandorf v. Hamilton*, 16 Q. B. D. 629, 633, very good: "In a seaworthy ship damage to goods caused by the action of the sea during transit not attributable to the fault of anybody," is a damage from a peril of the sea. I have thought that the following might suffice: "All perils, losses and misfortunes of a marine character, or of a char-

acter incident to a ship as such." I put it forward with distrust, but it would comprehend all the cases cited where the assured has recovered, save perhaps the *Panama* case [*infra*]. For example, it would include the case of the ships blown over while in dock, of the ship damaged by its moorings giving way, of the ship fired into by the ship. It would not include the cases put by Lord Esher, nor the case I put of the captain seized with giddiness dropping the chronometer into the hold; nor would it include the present case. The damage to the donkey engine was not through its being in a ship or at sea. The same thing would have happened had the boilers and engines been on land, if the same mismanagement had taken place. The sea, waves and winds had nothing to do with it.

As a matter of principle and reasoning I think the decision wrong. I think the judgment in the *West India and Panama Telegraph Company v. Home and Colonial Marine Insurance Company*, 6 Q. B. D. 51, wrong on the reasoning I have used. With most sincere respect, though it is true that what the winds are to a sailing vessel, steam is to a steamer, that does not decide the question, for it is not every damage to sails that would be covered by the policy. Suppose damage by rats or mildew to spare sails. As to Lord Esher's judgment in that case, I concur in his criticism on it in the present case. And I agree with Lopes, L. J., that the word "fire" in the policy will not sustain that judgment. The Lord Justice put the case of a spar falling on the deck, while getting under sail, and being broken, and says it would be within the policy. Perhaps; but if it would, it would be because it was a loss in navigation, a loss which could not have happened except on a ship. But suppose the spar was being used to erect an awning on deck to give shelter to dancers or the like, and was broken, the case would not be covered by the policy. It would not be a marine loss, not a loss with which the sea, or navigation, or the ship, as a ship, had anything to do.

I do not like cutting down the natural meaning of words; there is always great difficulty in saying what should be substituted. But it is admitted that some limit must be put on those in question here. I think a proper limit would exclude this loss. So that the judgment of the Master of the Rolls is, I think, right, and that of the other judges wrong, and their decision should be reversed.

Order appealed from and the judgment of the Queen's Bench Division reversed; cause remitted to the Queen's Bench Division.

[Opinions were also given by LORD HALSBURY, L. C., LORD HERSCHELL and LORD MACNAGHTEN.]

REISCHER *v.* BORWICK.

[1894] 2 Q. B. D. (C. A.), 548.

THE plaintiff was the owner of the paddle-wheel steam tug *Rosa*, which was insured by the defendants. The insurance was expressed in the policy to be, "Only against the risk of collision (as per clause attached), and damage received in collision with any object, including ice." The clause attached related to collision with other vessels; the policy did not include "perils of the sea."

During the currency of the policy, the *Rosa* was engaged in a trip on the Danube. In the course of her voyage, on March 4, 1892, she came into a collision with a floating snag, which first struck the bottom of the ship, and then fouled the port paddle-wheel and caused considerable damage to the machinery of the ship. Among other things, the cover of the condenser was broken, and a hole made in it about twenty square inches in area. The water poured in through the ejection pipes into the condenser, and thence through the hole in the cover into the ship. The captain anchored the ship, and set the pumps to work. He also succeeded in plugging the ejection pipes with wooden plugs; and so long as the ship was at anchor the water was thus prevented from entering the vessel to any dangerous extent. The captain then applied for assistance, and on March 6, a tug was sent to tow the *Rosa* to the nearest dock for repairs. The tug commenced to tow the *Rosa* on the same evening; but on the morning of March 7, while she was being towed, the water poured in rapidly through the hole in the cover of the condenser, and it was found that the plug in the port ejection pipe had fallen out and the ship was in danger of sinking. The towing was stopped, but the captain was unable to stay the rush of water through the ejection pipe, and, in order to save the lives of the crew, gave orders to the tug to tow the *Rosa* ashore. This was done, and she was grounded on the south bank of the river, where she was abandoned by the plaintiff.

The plaintiff claimed damages for the total loss of the vessel. The defendants paid into court 37*l.* 10*s.* to cover the damage caused by the collision with the snag up to the time when the vessel was taken in tow by the tug, but denied any liability for the subsequent damage, contending that the proximate cause of that damage was not the collision, but the towing to the port of repair. Kennedy, J., who tried the action without a jury, gave judgment for the whole amount claimed, and the defendants appealed.

DAVEY, L. J. — In this case the appellants admit that damage done by water coming through a hole caused by a collision with any

object is damage against which the assurers are bound to indemnify the assured. What is the *causa proxima* of the damage sustained in this case? The only answer seems to me to be the inrush of water through the hole in the condenser. What made the hole in the condenser? The collision made the hole in the condenser, and the broken condenser was a continuing source of risk and danger. The failure of the attempt to mitigate or stop the damage arising from the breach in the condenser cannot in my opinion be justly described as the cause of the ultimate damage. I therefore agree in the judgment which has been given.

Appeal dismissed.¹

[Opinions were also given by LINDLEY and LOPES, L. JJ.]

6. GENERAL AVERAGE.

THE MERCHANTS' AND MINERS' TRANSPORTATION COMPANY OF BALTIMORE v. THE ASSOCIATED FIRE- MEN'S INSURANCE COMPANY OF BALTIMORE.

53 MD. 448. — 1879.

ROBINSON, J. — This suit is brought by the appellant, owner of the steamer *George Appold*, on a *fire policy* issued by the appellee, insuring said steamer against loss by fire.

It appears that on the 20th of October, 1877, while loading at the port of Savannah, a fire was discovered among a cargo of cotton stowed in the forehold of the steamer, and in order to save both the steamer and cargo from destruction, it was found necessary to submerge the vessel. The damages direct and indirect to the *steamer itself*, were estimated at \$2,500, and the damages *to the cargo* at \$10,500. The adjuster to whom the matter was referred decided, that the *damages to the cargo* were, according to the usage and laws of the port of Baltimore, subject to the law of *general average*; and the appellant, as owner of the steamer, was obliged to contribute to the cargo the sum of \$5,231.29. The steamer was insured by the appellee and other *fire companies*, to the amount of \$80,000; and the cargo was insured under *marine policies*. The fire companies tender themselves ready to pay \$2,500, the amount of damage sustained by the steamer, but the appellant claims that in addition to this sum, he is entitled to recover the amount paid by him under the law of

¹ See also the exhaustive opinion as to proximate cause, in *Brown v. Ins. Co.*, 61 N. Y. 332.

general average to the cargo. And this is the question, and the sole question, at issue between the parties.

Were this a question to be determined purely upon equitable principles, there might be some ground to support the appellant's contention. The steamer was fully insured by the fire companies, and in the event of its destruction by fire, they would have been liable for the entire loss sustained by the appellant. In that event, instead of the sum of \$5,231.29 now claimed by the appellant, they would have been obliged to pay the entire amount covered by their respective policies. If the steamer was saved from destruction by being submerged, and the appellant, as owner, was, in consequence thereof, obliged to pay \$5,000 for damages to the *cargo*, it would seem but fair and equitable that he should be reimbursed a loss thus incurred for the benefit and protection of the insurers.

The liability, however, of the insurer is one arising upon *contract*, and must be determined by the terms of the policy upon which this suit is brought. It is hardly necessary to say, that a policy of insurance like any other contract, must be construed according to the evident intention of the parties, to be gathered from the language used, taken in connection with the subject-matter to which it refers. The rights and obligations of the parties to this suit must, therefore, be determined by the contract as made between them; and we have no power to add new conditions or to extend the risk beyond what is fairly within the terms of the policy itself. Now what are the terms of this policy? Looking at the face of it, we find the thing insured is a *steamer*, and the *peril* insured against is *loss by fire*. No other risk was assumed by the insurer, and indemnity against loss from this peril and this alone was the consideration for which the premium was paid by the insured. Here then is a contract in regard to a *specific subject* and made for a *specific purpose*, and by it the correlative rights and obligations of the parties must be determined.

It is not contended that the appellee has in express terms agreed to reimburse the appellant for losses which as owner he might be obliged to contribute to the cargo, but the argument is, that the insurer is liable for all damages resulting directly from the peril insured against, and that actual combustion is not always the *test* by which such damages are to be ascertained. This in a certain sense is true. The insurer of a stock of goods may be liable for damages caused by water, although the water was used to extinguish a fire upon the house in which the goods are stored. And upon the same principle it has been held, that the insurer of a house is liable for its destruction, when such destruction was absolutely necessary to arrest the progress of a fire in a city. *City Fire Ins. Co. v. Corlies*,

21 Wendell, 367; *Wetherall v. Marine Ins. Co.*, 49 Me. 200; *Geisek v. Crescent Mutual Ins. Co.*, 19 Ia. An. 297; *Hillier v. Allegheny Co. Mut. Ins. Co.*, 3 Penn. 470; *Thompson v. Montreal Ins. Co.*, 6 U. C., Q. B. 319. In these and other like cases, the law presumes, that the parties from the very nature of things, must have contemplated the natural and physical consequences resulting from the peril insured against. So, in this case, the appellee is not only liable for the damages to the ship from actual combustion, but also for damages to the vessel resulting directly from the means used to extinguish the fire. But the liability of the insurer arising in cases where the peril insured against has been the proximate cause of the loss, has never been held to cover damages to other property not insured by the policy.

If, then, the appellant is entitled to recover in this suit, it must be upon the ground, that the *law of general average*, by which he was obliged to contribute to the loss sustained by the *cargo*, constitutes and forms a part of the risk assumed by the appellee. Fire policies, it is well known, have been in existence for centuries, and it is but fair to presume that cases like the present, where the vessel has been insured by such policies, and the cargo insured under *marine policies*, must have frequently occurred; and yet no case has been found, in which it has been held, that the fire policy must contribute to the loss sustained by the cargo. Not only this, but the proof in the record shows, that the usage and laws recognized by mercantile men, and by which such policies are construed, are all against this contention. In determining for the first time a question arising upon insurance, such usage and laws are entitled to weight, not only because they are approved and sanctioned by practical and sagacious men, in regard to a subject-matter, in which they are alike interested, but also because the parties must be presumed to have contracted with reference to them. In fact it has been said, that the whole law of insurance has done little else, than to adopt such laws and usages, and to give to them the force of authority.

In the absence then of any authority to support the appellant's contention, let us see whether it can be supported on principle. The whole scope and object and purposes of a *fire policy*, are different from those of a *marine policy*. By the former, the insurer agrees to indemnify against loss by fire. That is the *only peril* for the loss by which he agrees to become responsible; and we have no right to enlarge the contract, or to extend the risk by implication. By a marine policy, the underwriter engages to pay not only the loss or damage to the thing insured, but also to reimburse the owner all sums paid by him under the laws of general average.

General average is a contribution by all the parties in a *sea adventure*, to a loss suffered for the common benefit of all. In such cases, where any sacrifice is deliberately and voluntarily made, or any expense is fairly and *bona fide* incurred, to prevent total loss, or some greater disaster, it is but just and right, that the sacrifice or expense should be borne relatively by the owner of the ship, freight and cargo, to the end, that the loss may fall equally upon all the parties in interest. *Birkley v. Presgrave*, 1 East, 228; *Hallett v. Wigram*, 9 C. B. 580; *Fletcher v. Alexander*, 37 L. J. (C. P.) 196. L. R., 3 C. P. 380. For risks thus assumed, and which may be said to be coextensive with the perils of the sea — embracing general average, salvage and abandonment, the insured pays a premium more than five times greater than the premium against loss by fire alone. If the appellant desired protection against the risk of general average, or against other perils of the sea, he should have insured under a marine policy. If he preferred to insure at a lower rate of premium, and to take upon himself all risks, other than loss by fire, he has no reason to complain, because the insurer refuses to reimburse him for a loss not covered by the policy; and which by the well-settled law of insurance constituted no part of the contract between the parties.

In the many cases relied on by the counsel for the appellant, the questions considered and decided arose on *marine policies*, under which the rights and obligations of the parties are altogether different from those belonging and incident to a *fire policy*. The policy sued on in this case limits the liability of the appellee to losses to the *steamer itself by fire*, and upon such a policy, the appellant is not entitled either upon principle or upon authority to recover the amount which under the law of general average, he was obliged as owner of the vessel to contribute to the cargo, even though the damages to the cargo were occasioned by the means used to extinguish the fire in the vessel.

The statement of facts shows, that the damages *direct* and *indirect* to the steamer were \$2,500, and this sum the appellee tenders itself ready to pay. There was no error therefore in refusing to grant the appellant's prayers, and the judgment must be affirmed.

Judgment affirmed.

7. TOTAL LOSS AND ABANDONMENT.

BRADLIE ET AL v. MARYLAND INSURANCE CO.

12 PET. 375. — 1838.

MR. JUSTICE STORY delivered the opinion of the court:

This cause comes before the court upon a writ of error to the Circuit Court of Maryland District. The original action was upon a policy of insurance dated the 22d of November, 1832, whereby the defendants, The Maryland Insurance Company, caused the plaintiffs by their agents, William Howell & Son, to be insured, lost or not lost, ten thousand dollars, at a premium of four per cent., on the brig *Gracchus*, Snow, master (valued at that sum), at and from Baltimore, for six calendar months, commencing that day at noon; and if she be on a passage at the expiration of that time, the risk to continue at the same rate of premium, until her arrival at the port of destination. The declaration alleged a total loss by the casting ashore and stranding of the brig on the 23d of March, 1833, in the river Mississippi. Upon the trial of the cause it appeared in evidence that the brig sailed from Baltimore on a voyage to New Orleans, and safely arrived there; and took on board part of her cargo (pork and sugar) at that port on a voyage for Baltimore; and about the middle of the 23d day of March, 1833, sailed from New Orleans, intending to proceed to Sheppard's plantation, on the river Mississippi, about thirty-three miles below New Orleans, to take in the residue of her cargo for the same voyage. At the English Turn, about twenty-two miles from New Orleans, the brig attempted to come to anchor, and in so doing lost the small bower anchor; and then dropped the best bower anchor, which brought her up. The next morning, while the brig was proceeding on her voyage, she struck on a log, broke the rudder pintles, when she fell off and went on shore. A signal was then made for a steamboat in sight, which came to the assistance of the brig, and in attempting to haul her off the hawser parted. It was then found that the brig was making water very fast. Help was obtained from a neighboring plantation. They commenced pumping and discharging the cargo on board of the steamboat; and after discharging all the pork and part of the sugar, they succeeded in freeing the ship on the afternoon of the same day. She was then got off and proceeded to New Orleans, where she arrived the same night, she continuing to leak, and both pumps being kept going all the time. The next day the master understood that the steamboat claimed a salvage of fifty per cent., and intended to libel for it. On the 27th of the same month the brig was taken across the river for repairs. On

the same day the brig was libelled for salvage in the District Court of Louisiana.

On the 25th of March, Snow, the master, wrote a letter to one of the owners containing an account of the loss and state of the brig, and also of the claim by the salvors of fifty per cent., which the underwriters on the cargo and himself had objected to, adding that they should hold the steamboat liable for any damage that might be incurred on account of the detention.

On the 22d of April, Messrs. Howell & Sons addressed a letter to the company, submitting the letter of the 25th of March to the company and say therein: "In consequence of the damage, together with the detention that must grow out of a lawsuit (in which it appears that the vessel is involved), the voyage being broken up; we do hereby abandon to you the brig *Gracchus*, as insured in your office, per policy No. 13,703, and claim for a total loss." On the same day the company returned an answer, saying: "We cannot accept the abandonment tendered in your letter of this date; but expect you to do what is necessary in the case, for the safety and relief of the vessel." * * *

The instructions of the court actually given in these prayers involve the following propositions: 1 That if the expenditures in repairing the damage exceeded half the value of the brig at the port of New Orleans, after such repairs were made, including therein the salvage awarded to the salvors, the plaintiffs were entitled to recover for a total loss under the abandonment made on the 22d of April, 1833. * * *

In considering the first it is material to remark that by the well-settled principles of our law, the state of the facts, and not the state of the information at the time of the abandonment, constitutes the true criterion, by which we are to ascertain whether a total loss has occurred or not, for which an abandonment can be made. If the abandonment, when made, is good, the rights of the parties are definitely fixed; and do not become changed by any subsequent events. If, on the other hand, the abandonment, when made, is not good, subsequent circumstances will not affect it so as, retroactively, to impart to it a validity which it had not at its origin. In some respects our law on this point differs from that of England; for, by the latter, the right to a total loss, vested by an abandonment, may be divested by subsequent events, which change that total loss into a partial loss. It is unnecessary to cite cases on this subject, as the diversity is well known; and the courts in neither country have shown any disposition of late years to recede from their own doctrine. The cases of *Rhineland v. The Insurance*

Company of Pennsylvania, 4 Cranch, 29, and *Marshall v. The Delaware Insurance Company*, 4 Cranch, 202, are direct affirmations of our rule; and those of *Bainbridge v. Neilson*, 10 East's Rep. 329; *Patterson v. Ritchie*, 4 M. & Selw. 394, and *M'Iver v. Henderson*, 4 M. & Selw. 584, of the English rule.

In cases where the abandonment is founded upon a supposed technical loss, by a damage or injury exceeding one-half the value of the vessel, although the fact of such damage or injury must exist at the time, yet it is necessarily open to proofs, to be derived from subsequent events. Thus, for example, if the repairs, when subsequently made, clearly exceed the half value, it is plain that this affords one of the best proofs of the actual damage or injury. On the other hand, if the subsequent repairs are far below the half value; this, so far as it goes, affords an inference the other way. But it is not, and in many cases cannot be decisive of the right to abandon. In many cases of stranding the state of the vessel at the time may be such, from the imminency of the peril and the apparent extent of expenditures required to deliver her from it, as to justify an abandonment; although, by some fortunate occurrence, she may be delivered from her peril without an actual expenditure of one-half of her value after she is in safety. Under such circumstances, if, in all human probability, the expenditures which must be incurred to deliver her from peril are, at the time, so far as any reasonable calculations can be made, in the highest degree of probability, beyond half value; and if her distress and peril be such as would induce a considerate owner, uninsured and upon the spot, to withhold any attempt to get the vessel off because of such apparently great expenditures, the abandonment would doubtless be good. It was to such a case that Lord Ellenborough alluded in *Anderson v. Wallis*, 2 M. & Selw., when he said: "There is not any case nor principle which authorizes an abandonment, unless where the loss has been actually a total loss or in the highest degree probable at the time of the abandonment." Mr. Chancellor Kent, in his learned Commentaries (vol. 3, 321), has laid down the true results of the doctrine of law on this subject. "The right of abandonment (says he) does not depend upon the certainty, but upon the high probability of a total loss, either of the property, or of the voyage, or both. The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard and of probable expense, exceeding half the value of the ship, the insured may abandon; though it should happen that she was afterwards recovered at a less expense." We have no difficulty, therefore, in acceding to the argument of the counsel for the plaintiffs in error on

this point. But its application to the ruling of the court will be considered hereafter.

In respect to the mode of ascertaining the value of the ship, and, of course, whether she is injured to the amount of half her value, it has, upon the fullest consideration, been held by this court that the true basis of the valuation is the value of the ship at the time of the disaster; and that, if after the damage is or might be repaired, the ship is not, or would not be worth, at the place of the repairs, double the cost of the repairs, it is to be treated as a technical total loss. This was the doctrine asserted in the *Patapsco Insurance Co. v. Southgate*, 5 Peters, 604; in which the court below had instructed the jury that if the vessel could not have been repaired without an expenditure exceeding half her value at the port of the repairs, after the repairs were made, it constituted a total loss. This court held that instruction to be entirely correct. It follows, from this doctrine, that the valuation of the vessel in the policy, or the value at the home port, or in the general market of other ports, constitutes no ingredient in ascertaining whether the injury by the disaster is more than one-half the value of the vessel or not. For the like reason, the ordinary deduction, in cases of a partial loss, of one-third new for old from the repairs is equally inapplicable to cases of a technical total loss by an injury exceeding one-half of the value of the vessel. That rule supposes the vessel to be repaired and returned to the owner, who receives a correspondent benefit from the repairs beyond his loss to the amount of one-third. But in the case of a total loss the owner receives no such benefit; the vessel never returns to him, but is transferred to the underwriters. If the actual cost of the repairs exceeds one-half of her value after the repairs are made, then the case falls directly within the predicament of the doctrine asserted in the case of 5 Peters, 604. The same limitations of the rule, and the reasons of it, are very accurately laid down by Mr. Chancellor Kent in his Commentaries (3 vol. 330), and in *Da Costa v. Newnham*, 2 Term Rep. 407.

If with these principles in view we examine the first instruction given in this case in the Circuit Court, it will be found to be perfectly correct. Indeed, that part of the instruction which declares that if the brig "could not be got off and repaired without an expenditure of money to an amount exceeding half her value at the port of New Orleans, after such repairs were made, then the plaintiffs are entitled to recover for a total loss under the abandonment," is precisely in the terms of the instruction given in *The Patapsco Insurance Company v. Southgate*, 5 Peters, 604. The error, which has been insisted on at the argument by the plaintiffs, is in the

additional direction; that "in ascertaining the amount of such expenditure the jury must include the sum for which the brig was liable to the salvors according to the decree of the District Court of Louisiana stated in the evidence;" which, it is contended, removed from the consideration of the jury the right to take into the account the high probability, at the time of the abandonment, of the allowance of a greater salvage, and even to the extent of the fifty per cent. then claimed by the salvors. And in support of the argument it is insisted that the state of the facts and the high probabilities at the time of the abandonment constitute the governing rule, and not the ultimate result in the subsequent events. But it appears to us that the argument is founded upon a total misunderstanding of the true import of this part of the instruction. The court did not undertake to say, and did not say, that the jury might not properly take into consideration the high probability of a larger salvage at the time of the abandonment, but simply that the jury must include in the half value the amount of the actual salvage decreed, because that was, in truth, a part of the loss. The instruction was, therefore, not a limitation restrictive of the rights and claims of the plaintiffs, but in fact a direction in favor of their rights and claims and in support of the abandonment. This is demonstrated by the then actual position of the cause. The defendants have asked an instruction that the costs of the repairs only, exclusive of the salvage, should be taken into consideration in estimating the half value, and also that the one-third new for old should be deducted from the amount of the cost in estimating the half value. The court in effect negatived both instructions; and in the particulars now objected to there was a positive direction to the jury not to exclude but to include the salvage in the estimate of the loss. In this view of the matter the instruction was most favorable to the plaintiffs, and so far from excluding evidence which might show the amount of the actual damage at the time of the abandonment, it resorted, and very properly resorted, to the subsequent ascertainment of salvage as positive evidence that to that extent at least the actual damage was enhanced beyond the cost of the repairs. We are entirely satisfied with this part of the instruction in this view, which seems to us to be the true interpretation of it. * * *

¹ In the *Sailing Ship "Blairmore" Co. v. Macredie*, [1898] A. C. 593, the ship was struck by a squall and sunk. The English rule as to constructive total loss is thus stated (p. 612): "The test of whether a constructive total loss has or has not occurred is to be found in the answer to be given to the question, What would a prudent owner do if not insured? If such an owner having regard to all the circumstances, would abandon his vessel and would not attempt to raise

8. PARTICULAR AVERAGE AND THE MEMORANDUM CLAUSE.

INSURANCE COMPANY *v.* FOGARTY.

19 WALL. 640. — 1873.

ERROR to the Circuit Court for the Southern District of New York.

Fogarty sued the Great Western Insurance Company on a policy of marine insurance and recovered a judgment for \$2,611.95 and costs. The policy was an open one, and the indorsement procured by the plaintiff on it was of insurance for \$2,250 on machinery on board the bark *Ella Adele*, at and from New York to Havana, free from particular average. The memorandum clause of the policy provided that machines and machinery of every description were warranted by the assured free from average unless general. The machinery insured consisted of the various parts necessary for a complete sugar-packing machine, including as part of it three sets of truck irons and also other extra truck irons. It was described in the bill of lading and invoice as eight pieces and eight boxes, composing one sugar-packer and three trucks.

The vessel on which these articles were being transported from New York to Havana, just before reaching the latter city, was driven on rocks in a violent gale, was filled with water, and finally became a total wreck, and was abandoned to the underwriters. Their agent at Havana took possession, and was engaged about a month in raising the cargo. A large number of the pieces composing the plaintiff's machinery was recovered and tendered to him at Havana, which he refused to receive on the ground that the insurance company was liable to him as for a total loss. They denied that under the circumstances of the case there was a total loss within the meaning of the policy, and the soundness of the instruction to the jury

and repair her, because the cost of doing so would exceed her value when thus restored to her former condition, a constructive total loss has been incurred." At p. 6 to the English rule as to when the rights of the parties are fixed by an abandonment is stated to be "that if in the interval between the notice of abandonment and the time when legal proceedings are commenced there has been a change of circumstances reducing the loss from a total to a partial one or in other words, if at the time of action brought the circumstances are such that a notice of abandonment would not be justifiable, the assured can only recover for a partial loss." In this case, after the vessel was sunk, notice of abandonment was given to the insurers, but thereafter and before action brought, they, at their own expense, raised the ship and claimed that as the ship could at the date of the action have been repaired by the expenditure of less money than her total value, the loss was not total but a partial one. It was held that the insurers could not charge a total loss of this character into a partial loss by raising the ship at their own expense. See also *Wallace v. Ins. Co.*, 22 Fed. 66.

on that point, given and refused by the Circuit Court on the trial, was the only question now before this court.

There was very little conflict of testimony as to what was recovered and what was its condition when tendered to plaintiff. It was all of iron. About half of it in weight was saved and the remainder left at the bottom of the sea. That which was saved was entirely useless as machinery, and was of no value except as old iron, for which purpose it would sell for about \$50. The machinery in working order was worth \$2,250. That which was saved was much broken and rusted, so that it would cost more to repair it, polish it, and put it in order for use than to buy a new machine.

Upon the testimony offered by the plaintiff the counsel for the defendant moved the court to instruct the jury that the action could not be sustained because it showed that there was not a total loss.

The court declined to do this, and the request was renewed at the conclusion of the defendant's evidence and again declined. Several prayers for instruction were then presented by the defendant, based upon the leading proposition that if any of the pieces of the machinery insured was recovered and tendered in specie to the assured, there was no total loss. These were refused and exceptions taken to all these refusals, on which error is assigned here. An exception was also taken as to the charge of the court laying down the law by which the jury were to decide the question of total loss submitted to them. That charge was in the following words:

"The meaning of the term 'free from particular average,' used in the policy, was that the defendants should be liable only for a total loss of the subject insured; that the subject insured was not machines, but machinery, by which is generally understood the several parts or portions of machines, adapted and fitted to be put together so as to constitute a machine (in this case a sugar-packing machine), and, applying the rule of law as to what constitutes a total loss to this particular subject insured, the jury will find whether any piece or portion of the machinery insured arrived at its destination in a perfect condition, so that it could have been used with its corresponding or connecting pieces had they also arrived in good condition; in that case the plaintiffs could not recover, as the loss would not be total; but that if every piece of machinery was so damaged by the perils insured against as to be entirely unfit for use on being supplied with its corresponding or connecting pieces, then there was a total loss of the subject insured as machinery, although the material itself might still exist; and if they so found they would find a verdict for the plaintiff for the sum named in the policy with interest from the tenth day of September, 1868."

Verdict and judgment having gone for the plaintiff, the insurance company brought the case here.

MR. JUSTICE MILLER delivered the opinion of the court. The question presented in this case for consideration has been often in the courts, and the discriminations between what is total loss and what is not are frequently very nice and delicate. The authorities are by no means uniform or consistent with each other when, as in the present case, the line of distinction is very narrow. Several other cases bearing upon the one before us have been decided in this court, and perhaps a short review of them may aid us here better than a more extended examination of the numerous other authorities on the subject.

In the case of *Biays v. Chesapeake Insurance Co.*, 7 Cranch, 415, the plaintiff was insured upon hides, the whole number of which was 14,565. Of these 789 were totally lost by the sinking of a lighter, and 2,491 of those sunk were fished up in a damaged condition and sold. The hides were memorandum articles, and this court held that inasmuch as less than 800 hides insured as part of a much larger number of the same kind was lost, it could not be a total loss, and overruled the argument that it was a total loss as to the 789 hides.

In the case of *Marcardir v. Chesapeake Insurance Co.*, 8 Id. 47, it is said that "it seems to be the settled doctrine that nothing short of a total extinction either physical or in value of memorandum articles at an intermediate port would entitle the insured to term the case a total loss, where the voyage is capable of being performed. And perhaps even as to extinction in value where the commodity *specifically* remains, it may yet be deemed not quite settled whether, under like circumstances, it would authorize an abandonment for a total loss.'

In the case of *Morean v. The United States Insurance Co.*, 1 Wheaton, 219, more than half of a cargo of corn was thrown overboard and lost. The remainder was saved in a damaged condition and sold at about one-fourth the market value of sound corn. This was held not to be a total loss, because part of the corn was saved, and though damaged, was of some value. It was, therefore, only a partial loss.

The next case is that of *Hugg v. The Augusta Insurance Co.*, 7 Howard, 595. The question there arose on an insurance of jerked beef of 400 tons, part of which was thrown into the sea and part of the remainder was so seriously damaged that the authorities of the city of Nassau refused to allow more than 150 of it to be landed. This was wet and heated, and not in a condition for reshipment. In answer to a question on this subject, certified to this court by

the judges of the Circuit Court, it was replied, "that if the jury found that the jerked beef was a perishable article within the meaning of the policy, the defendant is not liable as for a total loss of the freight, unless it appears that there was a destruction in *specie* of the entire cargo so that it had lost its original character at Nassau, or that a total destruction would have been inevitable from the damage received if it had been reshipped before it could have arrived at Matanzas, the port of destination." And though there are some very strong expressions of the judge who delivered the opinion as to the necessity of the total destruction of the thing insured, to establish a total loss in memorandum articles, no doubt the language here certified is the true expression of the court's opinion. And it will be observed that in this case, as in the case of *Marcardair v. Chesapeake Insurance Co.*, the destruction spoken of is destruction as to species, and not mere physical extinction. Indeed, philosophically speaking, there can be no such thing as absolute extinction. That of which the thing insured was composed must remain in its parts, though destroyed as to its specific identity. In the case of the jerked beef, for instance, it might remain as a viscid mass of putrid flesh, but it would no longer be either beef or jerked beef. And when the case went back for trial in the Circuit, the charge of Taney, C. J., to the jury places this point in a very clear light. Taney's Decisions, 168. He says there was not a total loss at Nassau, because a part of the jerked beef remained in specie, and had not been destroyed by the disaster. And if there was reasonable ground for believing that a portion of this beef could, by repairing the vessel, have been transported to Matanzas, although it might arrive there in a damaged condition, but yet retaining *the character of jerked beef*, there was no total loss. The jury found there was a total loss. The case of *Judah v. Randal*, 2 Caine's Cases, 324, where a carriage was insured and all lost but the wheels, is another illustration of the principle. A part of the carriage, namely, the wheels, a very important part, was saved; but the court held that the thing insured, to wit, the carriage, was lost — that it was a total loss. Its specific character as a carriage was gone.

In the case of *Wallerstein v. The Columbian Insurance Co.*, 44 New York, 204, the whole doctrine is ably reviewed with a very full reference to previous decisions, and it is there shown that there is far from unanimity in the language in which the rule is expressed; and the extreme doctrine of an absolute extinction or destruction of the thing insured is not the true doctrine, or, at least, is not applicable in all cases as a criterion of total loss.

The Circuit Court was right in holding that what was insured was

machinery — pieces or parts of a machine — pieces made and shaped to unite at points with other pieces, so as to make a sugar-packing machine. If parts of them were absolutely lost, and every piece recovered had lost its adaptability to be used as part of the machine; had lost it so entirely that it would cost as much to buy a new piece just like it, as to repair or adapt that one to the purpose, then there was a total loss of the machinery. If no piece recovered was of any use, or could be applied to any use connected with the machine of which it was a part, without more expense on it than its original cost, then there was no part of the *machinery* saved, however much of rusty iron may have been taken from the wreck. The court went quite as far in behalf of the defendant as the law justified, when it told the jury that the plaintiff could not recover if any piece or portion of the machinery insured arrived at its destination in a condition so perfect that it could have been used with its corresponding or connecting pieces, had they also arrived in good condition.

We are of the opinion that the charge of the court put the case very fairly to the jury, as we understand the law, and the judgment is, therefore,

Affirmed.¹

9. SUE AND LABOR CLAUSE.

AITCHISON *v.* LOHRE.

4 A. C. 755. — 1879.

LORD BLACKBURN. * * * It appears from the statements in the case that the *Crimea* on the voyage home during the month of January encountered a succession of stormy weather, and in consequence of the perils of the seas great damage was done to her, and she was reduced to a leaky and water-logged condition. It appears, incidentally, that some general average had arisen, for a proportion of which the ship was liable. The case then states that “On the 30th of January, the ship, being then in great danger of being completely lost, and being without fresh water or provisions, and in a helpless condition and not capable of being navigated, those on board of her sighted the steamship *Texas*, which ultimately took her in tow, without any agreement being come to as to remuneration for the service, and took her into *Queenstown*, and on or before the 11th of March she was placed in safety near the wharf of the *Victoria Dry Dock Company*. * * *

¹ See also *Mayo v. Ins. Co.*, 152 Mass. 172.

But there is a second point on which the courts below differed. The policy contains the usual clause as to suing or laboring. The Queen's Bench Division was of the opinion that the salvage, or general average expenses, described in the case did not come within that clause. The Court of Appeal was of a different opinion. In the judgment delivered by Lord Justice Brett, it is said, 3 Q. B. D. at p. 566, that "the general construction of the clause is that if, by perils insured against, the subject-matter of insurance is brought into such danger that, without unusual or extraordinary labor or expense, a loss will very probably fall on the underwriters, and if the assured or his agents or servants exert unusual or extraordinary labor, or *if the assured is made liable to unusual or extraordinary expense in or for efforts* to avert a loss, which, if it occurs, will fall on the underwriters, then each underwriter will," etc. Now if the part of this which is above emphasized is correct, there can be no question that both salvage and general average are unusual expenses to which the assured have become liable in consequence of efforts to avert a loss. And such seems to be the opinion of the editor of the last edition of *Arnould* on Insurance, who says, 2 Arn. 5th Ed. at p. 778, that salvage "is recoverable from him in virtue of an expense clause in the policy inserted for such a case, and known as the sue and labor clause;" but for that position he cites no authority, and though the Court of Appeal, in this case, agreed with him, I am unable to do so. With great deference to the judges of the Court of Appeal, I think that general average and salvage do not come within either the words or the object of the suing or laboring clause, and that there is no authority for saying that they do. The words of the clause are that in case of any misfortune it shall be lawful "for the assured, their factors, servants, and assigns, to sue, labor, and travel for, in, and about the defence, safeguard and recovery of" the subject of insurance, "without prejudice to this insurance, to the charges whereof we the insurers will contribute." And the object of this is to encourage and induce the assured to exert themselves, and, therefore, the insurers bind themselves to pay in proportion any expense incurred, whenever such expense is reasonably incurred for the preservation of the thing from loss, in consequence of the efforts of the assured or their agents. It is all one whether the labor is by the assured or their agents themselves, or by persons whom they have hired for the purpose, but the object was to encourage exertion on the part of the assured; not to provide an additional remedy for the recovery, by the assured, of indemnity for a loss which was, by the maritime law, a consequence of the peril. In some cases the agents of the assured hire persons to

render services on the terms that they shall be paid for their work and labor, and thus obviate the necessity of incurring the much heavier charge which would be incurred if the same services were rendered by salvors, who are to be paid nothing in case of failure, and a large remuneration proportional to the value of what is saved in the event of success. I do not say that such hire may not come within the suing and laboring clause. But that is not this case. The owners of the *Texas* did the labor here, not as agents of the assured, and being to be paid by them wages for their labor, but as salvors acting on the maritime law, which, as explained by Lord Chief Justice Eyre, in *Nicholson v. Chapman*, 2 H. Bl. at p. 257, already cited, gives them a claim against the property saved by their exertions, and a lien on it, and that quite independently of whether there is an insurance or not; or whether, if there be a policy of insurance, it contains the suing or laboring clause or not. The amount of such salvage occasioned by a peril has always been recovered, without dispute, under an averment that there was a loss by that peril; see *Cary v. King*, Cas. t. Hardw. 304; and I have not been able to find any case in which it was recovered under a count for suing and laboring. I do not much rely on this, for it is very likely that such counts often were in the declaration, and that therefore, no inquiry was made whether the loss was recoverable under one count or another; but at least there is no authority for the position that salvage (properly so called) was recoverable under that count.

There have been very few cases in our courts in which it has become necessary to discuss the nature of the suing and laboring clause. *Kidston v. The Marine Insurance*, Law Rep., 1 C. P. 535, is, I think, the only one in which there has been a recovery under it. There, however, all the extra labor was directly and voluntarily employed by the agents of the assured; and the charges were paid by them in consequence of this employment. In the very able and elaborate judgment of Mr. Justice Willes, not a word can be found to countenance this extension of the construction of the clause beyond what seems to me both its language and its object; and, except the passage introduced for the first time into *Arnould* by the present editor, I can find nothing in any text-book tending to support it. I, therefore, think that the judgment of the Court of Appeal should be reversed and that of the Queen's Bench Division restored. * * *

[Opinions also by the LORD CHANCELLOR, by LORD HATHERLEY and by LORD O'HAGAN.]

IV. TERMS OF THE LIFE INSURANCE CONTRACT.

I. AGE.

ÆTNA LIFE INSURANCE CO. v. FRANCE ET AL.

91 U. S. 510. — 1875.

MR. JUSTICE HUNT.— The action was assumpsit to recover \$10,000, the amount of a policy insured upon the life of Andrew J. Chew, in July, 1865. * * * The policy contained the following clause:

"And it is also understood and agreed to be the true intent and meaning hereof, that if the proposal, answers, and declaration made by said Andrew J. Chew, and bearing date of the 12th day of July, 1865, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect to be false or fraudulent, then and in such case this policy shall be null and void." The issuing of the policy was preceded by a proposal for insurance, which contained a number of questions propounded to Chew by the company, with the answers made by him. * * *

Among others were the following questions and answers, viz.:

"4. Q. Place and date of birth of the party whose life is to be insured?

"A. Born in 1835, interlined (Oct. 28), Gloster county, N. J.

"5. Q. Age next birthday?

"A. Thirty years." * * *

Evidence upon both sides was given as to the age of Chew tending to show that he was thirty-seven years old, or at least thirty-five years old, when he signed the application. * * *

The judge was requested to charge, — 5. If the jury believe that the answers to questions Nos. 4 and 5 in the application for insurance, as to the date of birth, and age next birthday, of said Andrew J. Chew, were false and untrue, the policy issued upon the application is void, and their verdict must be for the defendants.

In response to this request, the judge said, "If the jury believe that the answer to the questions numbered 4 and 5 were materially untrue as to the age of the said Andrew J. Chew, the policy is void, and the verdict must be for the defendants." The defendants were entitled to the charge they requested, without the addition made by the judge of the word "materially." The judge, however, proceeded to say, "And if he was thirty-seven, or even thirty-five years old, the difference was not immaterial. I give the fifth instruction as requested."

The process of reasoning by which the learned judge reached his

conclusion on this point we have held to be erroneous, viz.: that, to make the representation important, it must be material to the risk assumed; that the representation that he was but thirty years old, when he was thirty-seven, or even thirty-five, was material to the risk; and, if the jury believed that he was of the greater age mentioned, their verdict must be for the defendants; and, therefore, he charged as requested. The charge should have been, that, as Chew had represented himself to be but thirty years of age, if the jury found him then to be thirty-five years old, the false statement would avoid the policy, and they must find for the defendants, resting his direction upon the falsity alone of the statement.

Still we do not see that the defendants can ask relief for this reason. The charge was right, and could not be misunderstood by the jury. The allegation of the defendants was that Chew had misrepresented his age in the manner stated, and therefore the policy should be adjudged void. The judge charged that, if he had so misrepresented, the policy was void, and the verdict must be for the defendants. We think no valid exception can be taken to this charge. * * *

2. HEALTH.

MAINE BENEFIT ASSOCIATION *v.* PARKS.

81 ME. 79. — 1888.

PETERS, C. J. — The complainants, by this bill, seek to have cancelled a life insurance policy, issued by them to Alice J. Parks, for the benefit of her husband. It is claimed that the policy was wrongfully obtained, or improvidently issued. She has died since this proceeding was instituted. The policy being for the benefit of

¹⁴ We are of opinion that the jury should have been instructed, as requested by the defendant, that 'an understatement of age increases the risk of loss in a life insurance contract as matter of law.' The jury were permitted to find, as a matter of fact, that such a misstatement did not increase the risk, and to return a verdict for the plaintiff on that ground. It seems clear that death is likely to come more quickly to a person of a given age in sound health than if he were considerably younger, all other conditions being the same. It may be that in an insurance for a short term, or upon an endowment policy, the rule is not applicable to persons of every age and in all conceivable conditions; but upon a policy for life we think it should be held, as matter of law, that a material increase of age increases the risk. See *Brown v. Greenfield Life Association*, 172 Mass. 498; *Rainger v. Boston Mutual Life Association*, 167 Mass. 109." — *Dolan v. Assoc.*, 173 Mass. 197, 200.

her husband, the bill may be continued against him as her survivor.

The ground upon which the bill seeks a cancellation of the policy is, that she falsely stated in her application that she was at the date in good health, and that she had usually had good health. She declares at the close of her application, which is made a part of the policy, that she warrants all her statements in general and particular to be true to the best of her knowledge and belief, and that any untrue or fraudulent statement or concealment of facts by her shall forfeit and cancel all rights to any benefit under the policy. The questions of fact, whether she had good health when insured, and whether she usually had good health, were submitted to a jury which found in her favor. The motion is, by the complainants, not only to set the verdict aside, but that the court, notwithstanding the verdict, shall declare the policy to be void. The judge has reported the evidence, on this motion, to the full court for its decision of the questions presented. Possibly a question exists as to whether her answers in the application are warranties or representations, and nice distinctions may be found in the decided cases between the two kinds of contract. But that is immaterial here, as in either case the policy should be declared void, if the statements were untrue. It matters not whether they were warranted to be true, or merely represented to be true, if in fact untrue. *Campbell v. Life Ins. Co.*, 98 Mass. 381; 2 Pars. Cont., cited *post*, and cases.

The insured was about twenty-four years old, had three children, one about six months old, when her application was made. She was confined by the birth of her infant in November, 1887, and was sick of typhoid fever in January, 1888, from which she got up sometime in March afterwards. Her application is dated March 1, 1888, she was examined by the medical agent of the company on April 18th, and her application was approved by the company on April 22d. On May 12, 1888, her physician was called, who found her weak, with a cough, and sick with consumption, from which disease she died on the 21st of July afterwards. The complainants contended that she was sick of incipient consumption as early as when her application was tendered to the company, and that she never really recovered from the effects of the fever, with which she was afflicted at the beginning of the year. These positions are denied by the other side.

The usual question arises as to what is good health, and, as we find no statement of the law on the question more satisfactory than that of Professor Parsons, summarized from the authorities, we quote from it as expressive of our views on the subject: "The

health of the body required to make the policy attach, does not mean perfect and absolute health; for it may be supposed that this is seldom to be found among men. 'We are all born,' said Lord Mansfield, 'with the seeds of mortality in us.' Nor can there be any other definition or rule as to this requirement of good health than that it should mean that which would ordinarily and reasonably be regarded as good health. Nor should we be helped by saying that this good health must exclude all disorders, or infirmities, which might possibly shorten life; for, as has been well said in an instructive English case, that may be said of every disorder or infirmity. But it must obviously be very difficult to determine questions like these by any general rule. And it is the usual practice of courts to leave these questions to the jury. * * * Courts and juries usually, and we think properly, construe these questions and answers quite liberally in favor of the answerer, and quite strictly against the insurers, unless there be a reasonable suspicion of fraud. The good faith of the answers should be perfect. The presence of it goes very far to protect a policy, while a want of it would be an element of great power in the defense." 2 Pars. Cont. (6th ed.) 465.

There is obviously a close line between incipient disease, disease in its first stages, and merely a bodily condition which is susceptible to the contraction of disease. A weak person may be well, and a strong person sick. And, of course, a person may have a disease upon him without knowing it. The complainants contend that, whether the insured knew or appreciated the fact or not, there was an unbroken connection between the fever and the consumption, one running into the other, the effect of which caused death, and that it was impossible that she was in good health when insured. We are so strongly impressed, that the jury have committed error in their findings, we think the verdict should be set aside, and the case decided without committing it to a jury again. It would, to our minds, be flagrant injustice to other policy-holders on the facts presented, and evidently no other material facts are attainable, to allow this policy to stand. *Larrabee v. Grant*, 70 Maine, 79. We think the bill should be sustained without costs, the policy annulled, and all premiums received be returned.

Decree accordingly.

WALTON, DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.¹

¹ "The court also instructed the jury as to the meaning of the term 'good health' as follows: 'Good health means that he had no grave, important, or serious disease. * * * It means a state of health free from any disease or

✱ RAGAN, C., IN KETTENBACH v. OMAHA LIFE ASSOC.

49 NEB. 842, 849. — 1896.

IN this application¹ the assured was asked if he had then, or had ever had since childhood, any of fifty-seven named diseases. What sane man would consciously warrant that ever since his childhood he had not had any disease of the heart, liver, lungs, kidneys, bladder, stomach, or bowels? No sane man would consciously consent that on the literal truth of his negative answer to such a question should depend the validity of a life insurance policy. It might require a post-mortem examination to enable medical experts to determine whether any of such organs of the assured had since his childhood been diseased; and yet if these answers were warranties, and such an examination revealed a diseased organ, the policy would be void. The language of the lamented Justice Miller in *Insurance Co. v. Ewing*, 92 U. S. 377, is applicable here: "How can a man who has lived forty or fifty years prove that he never had dyspepsia or a diarrhœa or any disease of the heart or bowels? And how can he prove that his habits of life have always been correct, and that he never drank ardent spirits to the extent of intemperance? While it may be easy enough to prove the affirmative of one of these questions, it is next to impossible to prove the negative. The number of the questions now asked of the assured in every application for a policy, and the variety of subjects, and length of time which they cover, are such that it may be safely said that no sane man would ever take a policy if proof to the satisfaction of a jury of the truth of every answer were made known to him to be an indispensable prerequisite to payment of the sum secured, that proof to be made only after he was dead, and could render no assistance in furnishing it." In this case if we are to consider each of these statements and answers of the assured to be warranties, in order to do so we are compelled to adopt one of two assumptions: We must either presume that the insured was insane or a man of such colossal ignorance as to render his contracts voidable, or that

ailment that affects the general soundness and healthfulness of the system seriously, and not 'a mere indisposition, which does not tend to weaken or undermine the constitution of the assured. A mere temporary ailment or indisposition, which does not tend to undermine the constitution at the time of taking membership, does not render a policy void.' This charge was but following the language of this court in *Brown v. Insurance Co.*, 65 Mich. 306, and *Pudritzky v. Knights of Honor*, 76 Id. 428." — *Hann v. Nat. Union*, 97 Mich. 513, 519.

¹ The application in this case was, by stipulation in the policy, made a part of the policy.

the insurance company, aware of the technical legal meaning of the term "warranty" (and the assured being ignorant thereof), purposely used it, so that, in case the assured died before the premiums he paid equaled the amount of the risk, they might use that term to defeat his representatives. We do not think it fair or just either to the insurance company or to the insured to indulge either of these presumptions, but prefer to rest our decision on the proposition that the conduct and language of the contracting parties lead us to the conclusion that the mind of the assured never consciously intended and consented that the answers he made to the questions propounded to him should be deemed and taken to be warranties, as that term is understood in insurance law; and we accordingly hold that the statements and the answers made by the insured in his application for the policy in this suit were not warranties but representations. See *Aetna Life Ins. Co. v. Simmons*, 49 Neb. 811, and cases there cited.

HARLAN, J., IN *MOULOR v. AMERICAN LIFE INSURANCE CO.*

111 U. S. 335, 345. — 1884.

THE entire argument in behalf of the company proceeds upon a too literal interpretation of those clauses in the policy and application which declare the contract null and void if the answers of the insured to the questions propounded to him were, in any respect, untrue. What was meant by "true" and "untrue" answers? In one sense, that only is true which is conformable to the actual state of things. In that sense, a statement is untrue which does not express things exactly as they are. But in another and broader sense, the word "true" is often used as a synonym of honest, sincere, not fraudulent. Looking at all the clauses of the application, in connection with the policy, it is reasonably clear — certainly the contrary cannot be confidently asserted — that what the company required of the applicant, as a condition precedent to any binding contract, was, that he would observe the utmost good faith towards it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation or concealment of facts with which the company ought to be made acquainted; and that by so doing, and only by so doing, would he be deemed to have made "fair and true answers"

If it be said that an individual could not be afflicted with the diseases specified in the application, without being cognizant of the

fact, the answer is that the jury would, in that case, have no serious difficulty in finding that he had failed to communicate to the company what he knew or should have known was material to the risk, and that, consequently, for the want of "fair and true answers," the policy was, by its terms, null and void. But, whether a disease is of such a character that its existence must have been known to the individual afflicted with it, and, therefore, whether an answer denying its existence was or not a fair and true answer, is a matter which should have been submitted to the jury. It was an erroneous construction of the contract to hold, as the court below did, that the company was relieved from liability if it appeared that the insurer was, in fact, afflicted with the diseases or any of them, mentioned in the charge of the court. The jury should have been instructed, so far as the matters here under examination are concerned, that the plaintiff was not precluded from recovering on the policy, unless it appeared from all circumstances, including the nature of the diseases with which the insured was alleged to have been afflicted, that he knew, or had reason to believe, at the time of his application, that he was or had been so afflicted.¹

MEDICAL ATTENDANT. — In *Nelson v. Ins. Co.*, 81 N. W. 807 (Ia.), these questions and answers were in the application: "Q. What is the name and address of your medical attendant, or that of your family? A. None. Q. What physicians have you consulted here or elsewhere? When? For what complaints? A. None." The company defended an action upon the policy on the ground that the insured's answers were false. The court said: "If the insured consulted a physician, even though for a disease other than that from which death resulted, or from apprehension of having some ailment, the defendant was interested in knowing the fact, that further investigation might be made. By the answers that none had been seen, it may have been induced to refrain from doing so. The information as to whether the insured had had occasion to resort to medical aid, however, would seem of no little importance to a company about to take a risk on the extent of his life, and, if

¹ In *Powers v. Assoc.*, 50 Vt. 630, the application and policy stipulated for the truth of the answers; the court said (p. 636): "It is wholly immaterial whether the applicant knew of the existence of the disease, because he agreed absolutely that it did not exist. Nor is it any answer to say that the question is a scientific one, and a layman might easily be deceived into a false answer. Scientific or simple, the applicant took the risk of the answer. If he had answered that he had no knowledge that the disease existed, the finding of the jury might affect the result."

false in this respect, there appears no ground, in the absence of statutory enactment, for upholding a contract based thereon. As directly in point see *Cobb v. Association* (Mass.), 26 N. E. 231, 10 L. R. A. 666; *Insurance Co. v. McTague*, 49 N. J. L. 587, 9 Atl. 766."

In *Stewart v. Ins. Co.*, 81 N. W. 782 (Ia.), the application contained this question: "How long since you have consulted a physician?" The answer was, "Five years." Evidence that the insured had consulted physicians during the year previous was held insufficient to establish the falsity of insured's answer, because the question was ambiguous, and could be construed to mean either how long "since he last" or how long "since he first" consulted a physician, and it did not appear which construction he had given it.

In *Supreme Lodge v. Taylor*, 24 So. 247 (Ala.), this question was asked in the application: "Have you consulted a physician during the last five years? Answer. Yes. When and for what disease? Answer. Broken collar bone." Defendant averred that the insured had taken what is known as the Keeley Cure for alcoholism, and that said Taylor had warranted the truth of all statements in the application. This plea of defendant was adjudged bad on demurrer, the court saying, "Drunkenness, in common and ordinary speech at least, is not a disease, but a habit. We speak of the habit of drinking to excess, never of the disease of such indulgence; of habitual drunkenness or an habitual drunkard, but never of chronic drunkenness or a diseased drunkard."

In *Price v. Ins. Co.*, 17 Minn. 497, 519, the question was, "Name and residence of the family physician of the party, or of one whom the party has usually employed or consulted? Answer—have none." The court said: "The phrase 'family physician' is in common use, and has not, so far as we are aware, any technical signification. As used in this instance, and for the purposes of the testimony appearing in this case, the chief justice and myself are of opinion that it may be sufficiently defined as signifying the physician who usually attends, and is consulted by the members of a family in the capacity of physician."

HEREDITY. — In *Insurance Co. v. Gridley*, 100 U. S. 614, the application contained, among others, the following question: "Have the person's (whose life is to be assured) parents, uncles, aunts, brothers or sisters been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart or any other hereditary disease?" The applicant answered: "No, except one brother, temporarily insane six months since. Causes, domestic and financial troubles, followed by hard drinking and excessive use of opium and morphine. Recovery followed reformed habits. No hereditary taint of any kind

in family on either side of house, to my knowledge." The court said: "It was material to the risk, and hence important to the insurers, to know whether either of the maladies named or any serious malady not named was hereditary in the family of the applicant. If the question were answered in the affirmative, it might be a reason for declining to issue the policy. On the other hand, if either of such maladies existed in a member of the family other than the applicant, but was not hereditary, and, on the contrary, existed, according to the family history, for the first time in the person affected, and in that case was the effect of known contemporaneous causes, then it was not material to the risk, was of no interest to insurers, and it is fairly to be presumed they did not care to be advised upon the subject. This may be illustrated by the case of insanity mentioned in the answer of the applicant. He says his brother was afflicted in that way. 'Causes, domestic and financial troubles, followed by hard drinking and excessive use of opium and morphine.' He adds: 'Recovery followed reformed habits.' This explanation took the subject wholly out of the scope and purpose of the inquiry by the company, and made it, as it were, *res inter alios acta*."

INTOXICANTS. — For cases upon this subject, see Terms of the Accident Insurance Contract, *post*, p. 295.

3. OCCUPATION.¹

4. OTHER INSURANCE.

PHENIX LIFE INSURANCE CO. *v.* RADDIN.

120 U. S. 183. — 1887.

[*Reported herein at p. 108.*]

5. MILITARY OR NAVAL SERVICE.²

6. RESIDENCE AND TRAVEL.

EARL, J., *IN* EVANS *v.* UNITED STATES LIFE INSURANCE CO.

64 N. Y. 304, 307. — 1876.

The policy contained a provision that it should be "void, null and of no effect," in case Starr, whose life was insured, should, between the first day of July and the first day of November in any

¹ For cases upon this subject, see Terms of the Accident Insurance Contract, *post*, p. 299.

² See Occupation under Terms of the Accident Insurance Contract, *post*, p. 301.

year, visit any part of the United States lying south of the southern boundaries of Virginia and Kentucky without the written consent of the company. In November, 1869, he went to Louisiana and remained there until he died, on the 18th of March, 1872. The defendant alleged this as a breach of the policy and refused payment upon this ground. He had the written permit of the defendant to go to New Orleans and remain there until the 1st day of July, 1870. The claim on behalf of the plaintiff is that he became so sick and feeble that he could not return, and hence that his return was rendered impossible by the act of God, and that, therefore, his absence was excused and there was no breach of the policy. Even if this claim were otherwise valid the facts do not sustain it. The only proof upon the subject is that he met with an accident before going south; that his health was very poor in the summer of 1870, and "he could ride out to the plantation in which he was interested in a buggy, and ride back, not getting out of it, and was never any better." No witness testified that he was too unwell to return north or that he made any effort to return, and his condition before July first was not described. To bring the case within the supposed rule there should have been proof that for some time before July first he was unable to travel by any of the usual modes; not that it was merely inconvenient for him to travel, but impossible. He was bound to return if he could travel by short stages, or by incurring unusual expense to secure comfort, safety and convenience. But another answer to this claim is that he took the chances of being able to return. He went south for business purposes, knowing that the policy would be avoided if he did not return by the first day of July. He had the right to go and remain there until July first without the permit of the company. He obtained that that he might, without violating another condition in the policy, go and return upon the ocean if he desired to. He was feeble when he went, and he could not go so far south that he could not return, and after remaining there until he was too feeble to return enable the holder of the policy to claim that his return was rendered impossible by the act of God, and that thus the breach of the condition was excused.

The policy, therefore, became absolutely void after July 1, 1870. It was unnecessary for defendant to make any election or to do anything else to render it void. It became dead by its own terms, and could never again have any vitality except by some sufficient act of the defendant reclothing it with life. * * *

¹ In *Hathaway v. Co.*, 11 Cush. 448, "A person whose life was insured within the United States had permission to go to California and return home round Cape Horn, or by Vera Cruz. Being taken sick in California, he returned

7. SUICIDE.

PATTERSON AND OTHERS v. NATURAL PREMIUM MUT.
LIFE INS. CO.

100 WIS. 118. — 1898.

ACTION to recover upon an insurance policy issued by the appellant July 20, 1895, upon the life of Alexander W. Patterson, and originally payable to the administrators, executors, or assigns of the insured. On the 4th of October, 1895, the policy was assigned, with the consent of the company, to the plaintiffs, who are the children of the insured.

The insured had no active employment, and was in financial difficulties and shortly prior to his suicide talked with his children considerably about his business affairs, but showed no evidence of insanity. On the night of February 25, 1896, he deliberately shot and killed his wife at his home, and then called his daughter to the room, to see that she was in fact dead, after which he shot and killed himself. The expert evidence given on the trial tended strongly to show that the insured was sane when he killed himself.

WINSLOW, J. — There was evidence tending to show that the deceased was sane when he shot himself; hence, the verdict having been directed, it must be assumed upon this appeal that such was the fact. Starting from this basis, the argument of the defendant is, in substance: (1) That intentional self-destruction while sane is not a risk covered by a policy of life insurance, even when there is

home by way of Panama and Chagres, without the United States, and soon after died. *Held*, that the policy was thereby avoided, although there was then no usually traveled route by Vera Cruz, and although he returned the shortest and safest way." (*Syllabus*.) In *Nightingale v. Co.*, 5 R. I. 38, the court says: "It is admitted that the late Bishop Henshaw did, without consent of the defendant company issuing this policy, 'first had and indorsed thereon,' and between the 1st day of July and the 15th day of October, 1852, go into the State of Maryland, a portion of the United States beyond the limits of constant residence permitted by the policy, and there remain more than five days, to wit, about ten days, at the end of which period, and about the 20th day of July of that year, he died. The holy errand on which he went, the absence of all connection between his going and remaining and the cause of his death, are not permitted to swerve our judgment from the legal effect of so plain a breach of the condition of this policy, upon the occurring of which it is, by its own terms, 'to be void, and all payments thereon to be forfeited to the company.' " In *Mobile Co. v. Walker*, 58 Ala. 290, "the term residence, as employed in the questions propounded to the assured, was intended to signify the place of permanent, rather than mere temporary abode; in the sense of *domicile*, rather than of mere *inhabitancy*."

no clause in the policy specifically exempting the company from liability for such death; (2) the incontestable clause does not cover such a death, and, even if it be held to do so by its terms, such a stipulation would be void, as against public policy; (3) intentional self-destruction while sane is a crime, and hence the stipulation providing that death in violation of law is not a risk assumed by the company defeats recovery.

Upon the first proposition reliance is placed upon the recent decision of the Supreme Court of the United States in the case of *Ritter v. Mut. L. Ins. Co.*, 169 U. S. 139. In this case it was distinctly held that intentional self-destruction by the assured while sane is not a risk covered by a life insurance policy, even when the policy contains no exception as to such a death;¹ and it was further said that such a risk could not be legally covered by a policy, because it would be against public policy to make such a contract. This was an action by the executors of the estate of the assured upon a policy payable directly to his executors, administrators and assigns; and there was much evidence tending to show that the assured deliberately effected this, and a large amount of other life insurance, with the intention of committing suicide, and thus enriching his estate and paying his debts. Another and perhaps the only other direct adjudication to the same effect is the decision in the case of *Supreme Commandery K. G. R. v. Ainsworth*, 71 Ala. 436. The principle upon which these decisions rest is thus well stated in the last-named case: "Death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence. The uncertainty of the time of its occurrence is the material element and consideration of the contract. It cannot be in the contemplation of the parties that the assured by his own criminal act shall deprive the contract of its material element — shall vary and enlarge the risk and hasten the day of payment."

The authorities upon which these decisions are principally based consist of certain expressions of opinion contained in *Hartman v. Keystone Ins. Co.*, 21 Pa. St 466; *Moore v. Woolsey*, 4 El. & Bl. 243; and *Amicable Soc. v. Bolland*, 4 Bligh (N. S.), 194, in none of which cases, however, was the question directly in issue. Support

¹"When the policy is silent as to suicide, it is to be taken that the subject of the insurance, that is, the life of the insured, shall not be intentionally and directly, with whatever motive, destroyed by him when in sound mind. To hold otherwise is to say that the occurrence of the event upon the happening of which the company undertook to pay, was intended to be left to his option. That view is against the very essence of the contract." — *Ritter v. Co.*, 169 U. S. 139, 154.

for the proposition is also drawn from the well-established principle of the law of fire insurance, that if the insured intentionally set fire to the property insured and destroy it, he cannot recover for the loss. It is certainly not to be denied that the reasoning in favor of the proposition is cogent, and, were the question a new one in the law, the argument would be well-nigh irresistible, especially where, as in the *Ritter Case*, the policy runs in favor of the estate of the insured, and the proceeds will go to the enrichment of such estate, instead of to other beneficiaries. But it is by no means a new question, and there are numerous authorities which directly hold that, where life insurance is effected for the benefit of wife or children, suicide while sane is not a defense, in the absence of a condition or exception to that effect in the policy. *Fitch v. Am. P. L. Ins. Co.*, 59 N. Y. 557; *Darrow v. Family F. Soc.*, 116 N. Y. 537; *Patrick v. Excelsior L. Ins. Co.*, 67 Barb. 202; *Mills v. Rehstock*, 29 Minn. 380; *Kerr v. Minn. M. B. Asso.*, 39 Minn. 174; *N. W. B. & M. A. Asso. v. Wanner*, 24 Ill. App. 357. This principle was stated as the law in *McCoy v. N. W. Mut. R. Asso.*, 92 Wis. 577, although it probably was not directly involved in that case. The American text-books which treat of the subject very generally state this to be the law. 1 May, Ins. § 324; Niblack, Ben. Soc. & Acc. Ins. § 156; 3 Joyce, Ins. § 2653; 3 Am. & Eng. Ency. of Law (2d ed.), 1016. While these text-book citations may not be considered as very convincing, they certainly tend to show the general impression prevailing among the legal profession upon the subject, and that impression certainly prevailed in the Supreme Court of the United States when the case of *Life Ins. Co. v. Terry*, 15 Wall. 580, was decided; for in that case Mr. Justice Hunt refers to the contrary *dictum* in *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466, as *confessedly unsound*. The fact that insurance companies have almost universally deemed it necessary to insert in their policies provisions exempting them from liability in case of suicide, "sane or insane," may perhaps also be considered as showing the general trend of opinion upon the subject in insurance circles; but, whether this deduction is to be properly drawn or not, we think it certain that the fact that life insurance policies universally contain this provision is of weight in determining the construction now to be placed upon a policy which omits all specific reference to suicide, and also ostentatiously contains a clause providing that it shall be absolutely incontestable for any cause save for nonpayment of premiums or misstatement of age. What would an applicant for insurance be entitled to think was the meaning of such a policy, when presented to him, garnished with the usual and customary commendations of the average solicitor of

insurance? Certainly he would not think that its legal effect was the same as that of a policy containing the usual provisions against suicide, sane or insane.

The policy before us was originally payable to the administrators, executors, or assigns of Patterson; but within a few days it was assigned, with the consent of the company, to the plaintiffs, his children, and so remained. After this assignment it was no longer a policy in favor of Patterson's estate, but in favor of his children, as beneficiaries, as much as though originally made payable to them. Under the decision of this court in *Foster v. Gile*, 50 Wis. 603, such a beneficiary has an actual, subsisting interest in the policy, subject to the right of the insured, who has paid the premiums, to vest it elsewhere; but, until such action by the assured, the interest of the beneficiary is such a vested, subsisting interest as would pass to the administrator of the beneficiary in case of his death. Such being the case, it falls directly within the principle of the New York and Minnesota cases before referred to, which hold that, as against such a beneficiary, suicide of the insured while sane is not a defense, in the absence of a provision in the policy. Nor would the application of that principle to this case necessarily conflict with the *Ritter* Case, where the policy was in favor of the estate of the insured. It may well be in such a case that the intentional suicide of the insured while sane would prevent a recovery by his personal representatives, and yet not prevent a recovery in case of a policy in favor of beneficiaries who had a subsisting, vested interest in the policy at the time of the suicide, and who could not, if they would, prevent the act of the insured.

In determining what rule should be adopted by this court in the present case, there are numerous considerations which deserve attention. It must be borne in mind that the suicide clause has become so universal in policies that its absence at once attracts attention. It can hardly be otherwise than that the agent soliciting insurance under such a policy as this would at once call attention to its apparent liberality, in that there was no suicide clause, and, further, that there was in addition an "absolutely incontestable" clause; and the average laymen (not to say lawyer), in looking it over, would conclude that it was in fact a very favorable policy to the insured. These provisions are all carefully framed by the insurance company, and expressly framed to induce people to insure; and the principle is familiar and just that, when the policy is capable of two meanings, that which is most favorable to the insured is always to be adopted. *Utter v. Travelers' Ins. Co.*, 65 Mich. 545. In at least one state (Missouri) there exists a statute which prohibits the

defense of suicide, except when it was contemplated at the time of effecting the insurance, and makes void any contrary stipulation in the policy. R. S. of Mo. 1889, § 5855. This statute has been enforced by the courts of Missouri, and by the Circuit Court of Appeals of the United States, without apparent question as to its validity on the ground of public policy. *Keller v. Travelers' Ins. Co.*, 58 Mo. App. 557; *Knights Templar & M. L. I. Co. v. Berry*, 4 U. S. App. 353, 50 Fed. Rep. 511. Bearing these things in mind, and while conceding the strength of the arguments upon public policy on which the *Ritter* Case is based, we still think, in view of the prior decisions above cited to the contrary of the rule there laid down, and the general apparent acquiescence in those decisions by the courts and by the people, that we ought to hold, in accordance with those decisions, that, in a case where third persons are beneficiaries, intentional suicide of the insured while sane does not avoid the policy, in the absence of any provision in the policy to that effect. Whether the rule would apply to a case where the personal representatives of the insured were bringing the action for the benefit of the estate of the insured is not decided, because that case is not before us. * * *

1 "There has been much discussion in adjudged cases as to the effect of conditions in life insurance policies which provide that the policy shall be void if the assured comes to his death by his own hand. At one time policies provided, generally, that they should be void in case of death by "suicide," or "by one's own hand," without more. It was held that these terms were synonymous, and conveyed the same idea. It has been held quite generally by the courts of this country that this general condition in a policy referred to an act of criminal self-destruction, which did not apply to an insane person who took his own life. — *Association v. Waller*, 57 Ga. 533; *Hathaway v. Insurance Co.*, 48 Vt. 335; *Insurance Co. v. Graves*, 6 Bush, 268; *Newton v. Insurance Co.*, 76 N. Y. 426; *Scheffer v. Insurance Co.*, 25 Minn. 534; *Insurance Co. v. Terry*, 15 Wall. 580; *Insurance Co. v. Rodd*, 95 U. S. 232; *Insurance Co. v. Isett*, 74 Pa. St. 176; *Insurance Co. v. Moore*, 34 Mich. 41; *Eastabrook v. Insurance Co.*, 54 Me. 224. This being practically the settled law applicable to these conditions, insurance companies adopted a more specific condition as to liability in cases of death by suicide, and there are a number of cases where the language of the policy is substantially the same as that employed in the policy under consideration. In *Bigelow v. Insurance Co.*, 93 U. S. 284, the condition in the policy was that it should be void if the insured "shall die by suicide, sane or insane." In an action on the policy the defendant pleaded that the insured died from the effect of a pistol wound, inflicted upon his person by his own hand, and that he intended by this means to destroy his life. The plaintiff, by reply, pleaded that the insured, when he inflicted the pistol wound upon his person by his own hand, was of unsound mind, and wholly unconscious of the act. It was held that a demurrer to the replication was properly sustained. The effect of the holding was that the policy was void, notwithstanding the

8. POISON.¹9. VIOLATION OF LAW.²

self-destruction was accomplished at a time when the insured was wholly unconscious of the act. There is no substantial difference between that case and the one now under consideration." — *Scarth v. Soc.*, 75 Ia. 346.

In *Smith v. Soc.*, 123 N. Y. 85, recovery upon the policy was not allowed; the insured, when he took out the policy having the fraudulent intent to commit suicide.

WHAT CONSTITUTES INSANITY.—“ This case is governed by a uniform series of decisions of this court, establishing that if one whose life is insured, intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequence, and effect, it is not a ‘ suicide,’ or ‘ self-destruction,’ or ‘ dying by his own hand,’ within the meaning of those words in a clause excepting such risks out of the policy, and containing no further words expressly extending the exemption to such a case. *Life Ins. Co. v. Terry*, 15 Wall. 580; *Bigelow v. Berkshire Ins. Co.*, 93 U. S. 284; *Insurance Co. v. Rodel*, 95 U. S. 232; *Manhattan Ins. Co. v. Broughton*, 109 U. S. 121; *Connecticut Ins. Co. v. Lathrop*, 111 U. S. 612; *Accident Ins. Co. v. Crandal*, 126 U. S. 527.” — *Conn. Life Ins. Co. v. Akins*, 150 U. S. 468, 473. In *Van Zandt v. Ins. Co.*, 55 N. Y. 169, 173, the court states the English rule (citing *Borradaile v. Hunter*, 5 Man. & Gr. 639, and *Clift v. Schwabe*, 3 Man. Gr. & Scott, 437), as follows: “ According to those decisions, to take a case out of the proviso, the party must have been insane to such a degree as to render him unconscious that the act he did would cause his death, or he must have committed it under the influence of some insane impulse which he could not resist. His mind must have been so far gone that it was not moving to the act. It is not sufficient that his moral sense was so impaired as to deprive the act of its criminal character.” The court, criticising the rule adopted by the U. S. Supreme Court, says: “ In the practical administration of justice, in cases of this description, it seems to us a dangerous doctrine to hold that the attention of the jury should be directed principally to the degree of appreciation which the deceased had of the moral nature of his act, and that this question, most speculative and difficult of solution, should be made the test by which it should be determined whether he had knowingly and voluntarily violated the condition of his insurance. The real question is, whether he did the act consciously and voluntarily, or whether, from disease, his mind had ceased to control his actions. Supposing a man to be in possession of his will and of the ordinary mental faculties necessary for self-preservation, but that his mind has become so morbidly diseased on the subject of suicide that he cannot appreciate its moral wrong, and in this condition of mind he takes his own life voluntarily and intentionally — perhaps with the very object of securing to his family the benefits of an insurance upon his life — it is difficult to say that this is not a death by his own hand within the meaning of the policy.”

¹ For cases upon this subject, see Terms of the Accident Insurance Contract, *post*, p. 287.

² For cases upon this subject, see Terms of the Accident Insurance Contract, *post*, p. 301.

10. INCONTESTABILITY.

WRIGHT *v.* MUTUAL BENEFIT ASSOC.

118 N. Y. 237. — 1890.

POTTER, J. — This is an action to recover of the defendant the amount it agreed to pay under a policy or certificate insuring the life of Charles F. Wright. Upon the trial, after the plaintiff had introduced the necessary proofs to entitle her to a recovery, the defendant offered to prove as a defense to the action that the deceased, Charles F. Wright, and Byron D. Houghton, the beneficiary named in the policy, for the purpose of obtaining the policy and of defrauding the defendant, falsely represented to the defendant that Wright, the insured, was not then suffering and never had been suffering, from certain diseases which had seriously impaired his health, for the purpose of inducing and by means whereof defendant was induced to issue the policy insuring the life of said Wright, and that such representations were false, etc. This evidence was objected to by the plaintiff, that such proof was inadmissible under the provision of the policy; "that no question as to the validity of an application or certificate of membership shall be raised unless such question be raised within the first two years from and after the date of such certificate of membership, and during the life of the member therein named;" and the objection was sustained, and defendant excepted. The defendant also offered to show that the beneficiary, Houghton, had no insurable interest in the life of the insured; in short, that it was a speculative and fraudulent scheme, devised and practiced by Houghton to secure an advantage to himself upon the life of Wright, which must soon terminate from the diseases he was then afflicted with. This was also objected to by the plaintiff, and excluded by the court, and defendant excepted; the court holding that the defendant could not show any such thing, unless during the life of the assured, or during the period of two years from the date of the policy, such question had been raised.¹

These rulings present the main question upon this appeal, and, inasmuch as I have reached the conclusion that the judgment should be affirmed, there is but little, if any, occasion to add anything to the reasons contained in the opinion of the General Term affirming the judgment of the trial court in this case. 43 Hun, 61. There does not seem to be room for any doubt in relation to the

¹ *Contra*, as to the defense of lack of insurable interest in incontestable policies, *Anctil v. Ins. Co.* [1899] A. C. 609 (*ante* p. 59 *note*).

meaning of the stipulation referred to. The defendant's counsel does not contend that the language of the stipulation or waiver is not plain and comprehensive of everything which can constitute a defense, nor that the stipulation, though indorsed upon the certificate, does not form a part of the contract of insurance. But he argues, from certain supposed analogies to stipulations releasing carriers from liability, and which have been held not to exempt the carrier from liability for negligence, that it must have been intended between the defendant and the insured to except the defense of fraud from the operation of the stipulation in question. *Mynard v. Railroad Co.*, 71 N. Y. 180; *Holsapple v. Railroad Co.*, 86 N. Y. 275. It does not seem to me that there is any analogy between the two classes of liability, and nothing is more misleading than an assumed analogy. The liability of a common carrier of persons or property for injury or loss was adopted at a very early period, in view of the peculiar exigencies of the carrying trade, as a rule of public policy. The degree and extent of the liability of the carrier for negligence was fixed by law, and not by the terms of a contract between the parties. There were numerous contingencies incident to the carrying business other than the negligence of the carrier, which might result in loss or injury to the person or goods carried, and for which the liability of the carrier would depend upon the facts to be established upon a trial. It might well be held, in construing an agreement of exemption in general terms, that its office and effect was to relieve from those grounds of liability which depended upon the evidence, and not the liability which was fixed by law. The rules laid down in the cases referred to by the appellant's counsel is merely a rule of the construction of the terms and effect of an agreement. It by no means holds that liability for negligence may not be stipulated away, for the contrary has been repeatedly held, but the terms of the stipulation in those cases did not provide exemption from liability for negligence. The case under consideration is an alleged fraud in making a private contract between the parties to it.

The contract contains a great number of material representations in relation to the past and present condition of the insured, and of course they are variable with every applicant for insurance and every person insured. Such representations, if untrue, constitute a breach of warranty which will avoid the contract of insurance. If the representations are known by the party making them to be untrue when made, they would also constitute a fraud, and avoid the contract of insurance. The difference between the representations and the proof of them upon a trial to avoid the contract would be only the fact whether the party knew the representation was false when he

make it. It is to be presumed that the defendant had some purpose when it offered to the insured a contract containing the stipulation, and that the stipulation itself had some meaning. The court is asked to hold that the parties to the stipulation understood (for unless the insured so understood the stipulation the defendant was practicing a fraud upon him) that, while the stipulation embraced all representations that were untrue, it did not embrace the same representations if known by the party making them to be untrue. The practical difference or effect of this would be that upon a trial to enforce the contract the proofs of the representation, their materiality and untruth, would have to be made all the same; but the stipulation would come in as a defense to all representations, save those the insured knew to be false. While I might, perhaps, entertain the idea that the insurer so understood the stipulation, I am very confident that the insured did not so understand it. It seems to me the analogy is based upon an entire misconception of the object and meaning of the stipulation. It is not a stipulation absolute to waive all defenses, and to condone fraud. On the contrary, it recognizes fraud and all other defenses, but it provides ample time and opportunity within which they may be, but beyond which they may not be, established. It is in the nature of, and serves a similar purpose as statutes of limitations and repose, the wisdom of which is apparent to all reasonable minds. It is exemplified in the statute giving a certain period after the discovery of a fraud in which to apply for redress on account of it, and in the law requiring prompt application after its discovery, if one would be relieved from a contract infected with fraud. The parties to a contract may provide for a shorter limitation thereon than that fixed by law, and such an agreement is in accord with the policy of statutes of that character. *Wilkinson v. Insurance Co.*, 72 N. Y. 499, 502.

No doubt the defendant held it out as an inducement to insurance by removing the hesitation in the minds of many prudent men against paying ill-afforded premiums for a series of years; when in the end, and after the payment of premiums, the death of the insured, and the loss of his and the testimony of others, the claimant, instead of receiving the promised insurance, may be met by an expensive lawsuit to determine that the insurance which the deceased has been paying for through many years has not, and never had, an existence except in name. While fraud is obnoxious, and should justly vitiate all contracts, the courts should exercise care that fraud and imposition should not be successful in annulling an agreement to the effect that if cause be not found and charged within a reasonable and specific time, establishing the invalidity of the contract of insurance, it

should thereafter be treated as valid. Hence I fail to perceive any error in the disposition made of this question in the court below. * * *

I think the judgment should be affirmed, with costs. All concur, HAIGHT, J., in result; FOLLETT, C. J., not sitting.

GIVEN, J., IN *WELCH v. UNION CENTRAL LIFE INS. CO.*

108 IA. 224, 229, 230. — 1899.

INCONTESTABLE clauses in policies of life insurance are variable, some being absolute in form (that is, providing that the policy is incontestable at any time, or for any cause), others are qualified (as, that they are incontestable after a certain time, or after the death of the assured, or for other than particular causes named). The clause under consideration is of the latter class, and is among those enumerated on the second page of the policy, and made a part thereof. It is that, "except as hereinbefore provided, this policy shall be incontestable for any cause except misstatement of age." * * *

VII. Another, and probably more conclusive, reason why this defense may be asserted, is that fraud vitiates every contract into which it enters. In *Bliss Insurance*, § 247, it is said: "An agreement that an insurer will not raise any objection, even in case of direct personal fraud, is a void condition. It has even been questioned whether it would not be sufficient to render the policy itself wholly void *ab initio*, as an illegal contract. In these cases, then, fraud, if not mentioned, must be assumed to be excluded, since that construction is always to be preferred which will support a contract, and it is never to be supposed that the parties to it intend an illegal stipulation where a lawful meaning can be given to their words. Of course, this construction cannot make the policy really indisputable, for it leaves open the question whether the statement or omission complained of was fraudulent or not, and also what is the true meaning or construction of the policy itself." This statement of the law is fully supported in all of a large number of cases which have been examined, and disputed in none. There are cases wherein the policy provided that it should be incontestable for any cause, or for certain causes, after a specified length of time, and others providing that the policy should be incontestable after the death of the assured. Such provisions are held to be in the nature of a statute of limitation or repose, and that, as the parties may stipulate as to the time when action may be brought, so they may stipulate

as to the time within which certain defenses may be asserted. Such stipulation did not condone the fraud, but limited the insurer to a time within which it might assert the fraud as against the contract. In these cases the right to defend on the ground of fraud within the time agreed upon is recognized. Of this class of cases we refer to *Wright v. Association*, 43 Hun, 61 (affirmed 118 N. Y. 237); *Association v. Robinson*, 104 Ga. 256, 30 S. E. Rep. 919. An able article upon this subject, in which the leading cases are referred to, will be found in 45 Central Law J. 425. Our conclusion is that the court erred in sustaining appellee's motion for a verdict.¹

II. NON-FORFEITURE.

KNAPP v. HOMEOPATHIC MUTUAL LIFE INS. CO.

117 U. S. 411. — 1886.

ACTION upon a policy of life insurance.

MR. JUSTICE GRAY. * * * The decision * * * depends upon the true construction of the non-forfeiture clause in the policy.

The single purpose of this clause is that, after two annual premiums shall have been paid, a failure to pay any subsequent premium shall not have the effect of avoiding the whole insurance, but the assured shall have the right to an insurance for such a sum and such a time as the premiums already paid would equitably cover. The policy does not declare that it shall continue of itself, without any act of the assured. On the contrary, it stipulates that "the party insured shall be entitled to have it continue in force for a period to be determined" by ascertaining, according to certain rules, the net value of the policy at the time of failure to pay a pre-

¹ The above quotation from Bliss is by him quoted from and credited to Bunyon's *Law of Life Assurance*, p. 88. Bliss cites as in accord with Bunyon, *Wheelton v. Hardisty*, 8 E. & B. 232, and *In re Gen. Prov. Life Assoc. Co.*, 18 Weekly Reporter, 396, in which latter case the policy was indisputable, and admitted on the face of it, the truth of the statements in the proposal, yet it was held void for fraudulent concealment; the court not even discussing the provision as to incontestability.

Some states have passed statutes respecting the incontestability of policies. See the note in 42 L. R. A. 257; and, for example, the Ohio provision (§ 3,626 Rev. St. Ohio) which reads: "All companies, after having received three annual premiums on any policy issued on the life of any person in this state, are estopped from defending upon any other ground than fraud, against any claim arising upon such policy by reason of any errors, omissions, or misstatements of the assured, in any application made by such assured, on which the policy was issued, except as to age."

mium, and making the amount of that value, considered as a single premium, the basis for determining the time for which there shall be a temporary insurance for the full amount of the original policy. It then prescribes an alternative by which the party insured, "at his option, may receive a paid-up policy for the full amount of premium paid." In short, the forfeiture of the policy, by a failure to pay any premium after the first two, is not absolute, but qualified; and the party insured is entitled to be insured according to the sum already paid in premiums, either for the full amount of the original policy, so long as that sum would pay for it, or else for the full term of the original policy for such amount as that sum would pay for.

Then follows the proviso: "that unless this policy shall be surrendered and such paid-up policy shall be applied for within ninety days after such nonpayment as aforesaid, then this policy shall be void and of no effect." It is contended on behalf of the plaintiff, that the words "such paid-up policy" show that this provision refers only to a new insurance determined by the second method, that is, for the full term of the original policy, and for an amount depending upon the sum already paid in premiums; and that if the assured does not seasonably apply for such an insurance, she still remains insured for the full amount for a time computed according to the sum paid. But the proviso does not say that, upon a failure to surrender the original policy and to apply for a paid-up policy, the original policy shall stand good for a temporary insurance; but that it "shall be void and of no effect." The result of either of the two methods already prescribed, for determining the extent of the insurance, is a paid-up policy. According to either method, there is to be no further payment of premium, nor is the original policy continued in force; but the assured is to have the benefit of the sum already paid in premiums, by being insured, either for the amount of the original policy for a time to be determined, or for the time of the original policy for an amount to be determined. Taking the whole clause together, it is clear that the assured is to have the benefit of that sum in one of two ways at her election, and that election must be made within a certain time. As that time expired without any election, or any excuse for not making one, the forfeiture became complete under the express provisions of the policy, and the Circuit Court rightly held that the action could not be maintained.

Judgment affirmed.¹

¹ Some states provide by statute against forfeiture. The following statute is representative: "* * * * All life insurance companies, authorized to transact business in this state, shall provide in their policies that, after three or

V. TERMS OF THE ACCIDENT INSURANCE CONTRACT.

1. WHAT IS AN ACCIDENT.

LOVELACE v. TRAVELERS' PROTECTIVE ASSOC.

126 Mo. 104. — 1894.

ACTION upon a benefit certificate issued by the defendant. Judgment for plaintiff; defendant appeals. The contract sued upon was contained in the certificate and certain parts of the constitution of the defendant. The constitution provided that "four thousand dollars shall be paid to the heirs of any deceased member in case of death by accident."

BARCLAY, J. — This is an action upon a benefit certificate, in the nature of an insurance policy, issued to Charles H. Lovelace, by the Travelers' Protective Association of America, the defendant, a benevolent association incorporated under the laws of Missouri. The pleadings need not be recited, as no point is raised touching the formal presentation of the case. Counsel for both parties, with

more annual premiums have been paid upon a policy of life insurance, and default is made in payment of any subsequent premiums when due, then notwithstanding such default, the company shall convert the same into a paid-up policy for as many dollars as the value of such policy will purchase, to be determined by the table of surrender values in use by such company at the time of the issue of policy, which shall be not less than the full net value of the policy per actuaries' experience table of mortality, four per cent. interest; *provided*, That the application be made in writing for such paid-up policy by the assured within six months after default in the payment of premiums shall first have been made." — Mill's Ann. St. of Colorado, § 2223.

A question upon which there is a conflict of authority is the extent to which a paid-up policy issued pursuant to the nonforfeiture clause of the original policy is affected by the forfeiture clause in the original policy. In *Bruce v. Ins. Co.*, 58 Vt. 253, the court says: "The annual premium payable on Bruce's policy in advance was \$104.86. Under the rules of the company this could be paid in cash, or one-half in cash and the other half by a note running one year, the interest thereon being paid in advance. Bruce paid his annual premiums on the half-cash and half-note plan for four years, and then claimed a paid-up policy for four-tenths of the sum insured. * * * When the policy was issued it provided in its third condition, that 'if the assured shall not pay the said annual premiums on or before noon of the several days hereinbefore mentioned for the payment of the same and the interest annually in advance on any outstanding premium notes which may be given for any portion thereof or shall not pay at maturity any notes or obligations given for the cash portion of any premium or part thereof, then and in every such case, this policy shall cease and determine, and said company shall not be liable for the payment of the sum insured or any part thereof, except as hereinafter provided.' The fourth condition then follows: 'That if, after the receipt by this company of

commendable frankness and brevity, have put the material facts into compact form to facilitate the solution of the controversy. It was submitted to the trial judge, without a jury, upon an agreed statement and depositions. The only question now urged is a question of law. Mr. Lovelace was a member in good standing in the defendant association when he met his death, August 8, 1892. The plaintiff is his mother, the beneficiary in his membership certificate. The contract of insurance is contained in the certificate, and in parts of the constitution of the association, which, counsel mutually agree, control the issue of the litigation. In the statement introducing the report of the case copies of these documents are given. No point is raised touching proofs of loss, notice, or any formal matter. The defendant meets the case broadly on its merits. The decisive question before us is, was the death of the assured an "accident," within the true meaning of that term as used in the contract of insurance? That question was presented by an instruction that, under the evidence, plaintiff was not entitled to recover, which the trial court refused to give. On the contrary, the court found for the plaintiff, and gave judgment accordingly for \$4,119.30

two or more annual premiums upon this policy, default shall be made in the payment of any subsequent premium when due, then, notwithstanding such default, this company will convert this policy into a paid-up policy for as many tenth parts of the sum originally insured as there shall have been complete annual premiums paid when such default shall be made.' * * * The very end aimed at when offering and receiving the reduced or paid-up policy is, as the company's circular declares, to obviate 'all possible danger of loss.' The paid-up policy issues as a redemption from forfeiture of the original policy which otherwise would 'cease and determine,' for nonpayment of premiums. It can issue only in case two full premiums have been paid and if so many have been paid, the right to it is given to the policy holder by the original policy itself. Thus his right to it is a contract right that inheres in the original policy. When issued it is not itself subject to forfeiture for further nonpayment of premiums. If any are payable in cash, notes, or interest, the company must stand for their collection on the promise of the policy holder to pay. If the paid-up policy could be forfeited for further nonpayment of premiums, it becomes a delusion and a snare. The policy holder is no better off than before, so far as the risk of forfeiture is concerned. *May, Ins.*, §§ 345, 363. The paid-up policy issues for so many tenths of the sum insured as annual payments have been made and is based on the theory that insurance to such an amount has been fully paid for." *Accord*, *Cowles v. Co.*, 63 N. H. 300: "The original contract did not make the nonpayment forfeiture clause applicable to the promised 'paid-up' policy into which the original could be converted." *Contra*, *Holman v. Co.*, 54 Conn. 195, but the court expressly restricts its decision to the precise question "whether the paid-up policy involved in this suit contains a provision whereby the failure to pay interest has accomplished the forfeiture of the policy."

(which included some interest). Defendant then appealed, after the usual preliminaries.

The following facts show the circumstances of the death of Mr. Lovelace: He was a commercial traveler. On the 5th day of August, 1892, he came as a guest to the hotel in Hazelhurst, Miss. He was a friend of the proprietor, and spoke to some member of the latter's family on the porch of the hotel before entering the office. Another man named Graves was in the office of the hotel, making more or less noise, and cursing at times, when Lovelace arrived, about half-past eleven o'clock at night. The only witness besides Graves who saw the killing was one Scott. From his testimony it seems that that night the proprietor, Mr. Brown, was sick, and there was no one in charge of the office. Scott was putting in the chairs from the porch, when Lovelace walked in and said, "Who has got charge of the office to-night?" Scott answered, "No one," and that he was going to bed. Lovelace then said, "It looks like somebody ought to be about it;" and Lovelace then turned to Graves, and said, "Look here, young man, you have got to get out of here, drinking and cursing that way," and Graves replied, "What have you got to do with it?" Lovelace answered, "I am a guest at the hotel, and I think a heap of the family; and I think, in the absence of Mr. Brown, it is sorter my duty to see after things." Graves said, "You had better put me out." Lovelace replied, "I will do it in a pair of minutes," and Graves said, with an oath, he would like to see him (Lovelace) put him out. Lovelace said, "I will do that — quick." Scott then walked between them, and separated them. Lovelace started upstairs, but it seems that he turned again, and went back to the register. Lovelace then said, with an oath, "Don't you shake your hand in my face." (Graves had made a gesture which Lovelace interpreted as he stated.) They were then a few feet apart. Graves replied, "You put me out. You have not got any more to do with this than I have." Lovelace then declared he would slap Graves, and applied an opprobrious epithet to him. Lovelace then slapped and pushed Graves back until he struck the wall or door, which was closed, and, whilst they were thus together, Graves drew a pistol from his pocket, and shot Lovelace several times, in consequence of which he afterwards died. Lovelace weighed 175 pounds. He would have pushed Graves, who was much lighter and smaller, out of the door, if it had been open. Lovelace did not know Graves at the time, for the next day he asked what boy that was that shot him.

The foregoing gives a sufficient description of the scene, as defendant claims it occurred. The substance of the contention on

that side is that Mr. Lovelace lost his life at the hands of Graves in a fight with the latter, brought on by the language and acts of the former. It was not claimed, however, that Lovelace knew that Graves was armed when the difficulty began. The defendant asserts that "it is not an accidental killing, such as to make the defendant liable, where the death was the result of a rencounter, or where the party killed was the voluntary agent in bringing on the difficulty resulting in his death, or placed himself in such a position as to induce it." On the other hand, the plaintiff insists that the occurrence was an "accident." The contract in this case is to be interpreted so as to give effect to the intention of the parties, as expressed by the language they have used. That intention is, moreover, to be construed as the reasonable and natural one imported by their words. *Ruth. Inst.* (2d Am. ed.), p. 413. "In case of death by accident" is the language immediately in view. In the same contract we note that the defendant was to pay \$100 "in case of his death from natural causes." The form of the contract is very simple. It is free from those limiting terms which, in two of the three cases cited by the defendant, formed the basis of the judgments therein. We are merely called on to say whether his death was by "accident," within the intention of these parties. They did not define the term, further than its use in contradistinction to "death from natural causes" may be considered as having some significance. We hence should give the word its usual, natural, and popular meaning, there being nothing to indicate a different purpose in its use. In that sense, was Lovelace's death an accident? We find the following definitions of "accident" in the law dictionaries: "Death by accident means death from any unexpected event which happens as by chance, or which does not take place according to the usual course of things." *Anderson* (1889). "An unusual or unexpected event." *Abbott* (1879). "An unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undesigned occurrence." *Black* (1891). "An event which, under the circumstances, is unusual, and unexpected by the person to whom it happens." *Bouvier* (1883). "A casualty; an act of Providence; an event that takes place without one's foresight or expectation." *Burrill* (1887). "An extraordinary incident; something not expected." *Whart. Law Lex.* (1883). The larger dictionaries of the English language furnish these, among other, definitions of "accident," viz.: "In general, anything that happens or begins to be without design or as an unforeseen effect. * * * Specifically an undesirable or unfortunate happening; * * * a casualty or mishap."

Century (1889). "Literally, a befalling; an event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event; * * * often an undesigned and unforeseen occurrence of an afflictive or unfortunate character; a casualty; a mishap; as, to die by an accident." Webster, International (1892). "An event proceeding from an unknown cause, or happening without the design of the agent; an unforeseen event; incident; casualty; chance." Worcester (1888). On several occasions the courts have approved or quoted some of the foregoing definitions in dealing with the subject of accident insurance. *Schneider v. Insurance Co.* (1869), 24 Wis. 30; *Insurance Co. v. Martin* (1869), 32 Md. 315; *Ripley v. Assurance Co.* (1870), 2 Bigelow, Cas. 741, Fed. Cas. No. 11,854; *Insurance Co. v. Burroughs* (1871), 69 Pa. St. 51; *Supreme Council, etc. v. Garrigus* (1885), 104 Ind. 140, 3 N. E. 818. In other cases they have freely used the word in decisions, in the broad meaning which those definitions express. *Vincent v. Stinchour* (1835), 7 Vt. 62; *Bostwick v. Stiles* (1868), 35 Conn. 195; *Clements v. Railway Co.* (1894), 2 Q. B. Div. 482. Some special cases on accident policies, different from that now before us, furnish, nevertheless, opinions of learned judges which cast some useful light on the present controversy. In *Sinclair v. Assurance So.* (1861), 4 Law T. (N. S.) 15, a case wherein the Court of Queen's Bench denied a right of recovery for death caused by a sunstroke sustained by the master of a ship in China, holding that such death was not "a personal injury arising from an accident at sea," it was said by Chief Justice Cockburn: "It is difficult to define the term 'accident,' as used in a policy of this nature, so as to arrive with perfect accuracy at the boundary line between death from accident and death from natural causes. At the same time we think we may safely assume that in the term 'accident,' as so used, some violence, casualty, or *vis major* is necessarily involved." In *Fenwick v. Schmalz* (1868) L. R. 3 C. P. 313, Willes, J., held that a snowstorm was not an accident (as mentioned in a charter party), because it is one of the ordinary operations of nature. He said it "is an incident, rather than an accident." He then remarked: "An accident is not the same as an occurrence, but is something that happens out of the ordinary course of things." In *Ripley v. Assurance Co.* (1870), already cited, it is said: "In the more popular and common acceptation of the word, 'accident,' if not in its precise meaning, includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event." Death by drowning (*Windspear v. Insurance Co.* [1880], 6 Q. B. Div. 42), and by fright (*McGlinchey v. Casualty Co.* [1888], 80 Me. 251, 14 Atl. 13) have been held to

be deaths by accident under policies of much narrower scope than that now before the court.

We have quoted these various cases, definitions, and comments, not with a view to approve or criticise any one of them, but to indicate the very wide range of meaning borne by the word "accident," when unaccompanied with any limitation in the context. We shall not attempt to furnish any general definition of an accident in the particular case before us, further than the conclusion we shall announce may imply. The learned counsel for defendant concedes the force of the argument deduced from the ordinary meanings of the word, but insists that they cannot apply where the insured has voluntarily assumed the risk which proves to be fatal—in this instance, by entering into the altercation which led to his death. But there is one weak point in that contention. There is no proof whatever that the insured had any cause or reasonable ground to anticipate that he would be shot or killed when he undertook to attempt to eject Graves from the hotel. There is no proof that Graves exhibited a weapon, or made any remarks indicating a purpose to shoot, before the affray. The mere fact that Lovelace engaged in or brought on a fight in the manner described did not of itself indicate that he sought death, or had reason to expect it as a consequence of his action. In *Schneider v. Insurance Co.* (1869), 24 Wis. 28, a party was allowed to recover upon an accident policy, though it appeared he had been negligent in attempting to board a moving train of cars. The court said: "There is nothing in the definition of the word 'accident' that excludes the negligence of the injured party as one of the elements contributing to produce the result. * * * An accident may happen from an unknown cause, but it is not essential that the cause should be unknown. It may be an unusual result of a known cause, and therefore unexpected by the party. And such was the case here, conceding that the negligence of the deceased was the cause of the accident." Page 30. That decision was approvingly followed in the case from the 22 Md. report already cited. In *Keene v. Association* (1894), 161 Mass. 149, 36 N. E. 891, a recovery on an accident policy was sustained where the assured was run down while passing over a street crossing of a railway track in front of a moving freight car, notwithstanding the policy required the assured "to use all due diligence for personal safety." In *Cornish v. Insurance Co.* (1889), 23 Q. B. Div. 453, it appeared that the insured met his death by attempting, in broad daylight, to cross the main line of a railway in front of a coming train, which struck and killed him. The English Court of Appeal held that there could be no recovery upon a policy which

excepted, from the risks insured against, accidents happening by "exposure of the insured to obvious risk of injury." But Lindley, L. J., who delivered the leading opinion, placed the ruling upon the language just quoted, remarking, in so doing: "We accept the view of the jury that this accident may be called an ordinary misadventure, but the question is whether the policy covers it." He thus characterized the mishap as an "accident," notwithstanding the gross negligence of the insured. In *Insurance Co. v. McConkey* (1888), 127 U. S. 661, 8 Sup. Ct. 1360, where the insured had been killed by a shot (whether fired by himself or by another was in issue), the Supreme Court of the United States based a similar ruling, denying a recovery, on the express terms of the policy, excepting from its scope "intentional injuries inflicted by the insured or any other person." A like ruling was made in construing the same language of an accident policy in this state. *Phelan v. Insurance Co.* (1890), 38 Mo. App. 640. In other cases it has been held that death produced by the direct violence of a third party is none the less an accident, as regards the insured, because the injury was intentionally inflicted by the third party. *Hutchcraft's Ex'r v. Travelers' Ins. Co.* (1888), 87 Ky. 300, 8 S. W. 570; *Richards v. Insurance Co.* (1891), 89 Cal. 170, 26 Pac. 762. But in the former case a recovery was denied because of a clause in the policy similar to that quoted above from the McConkey case. It has been declared, with reference to fire insurance, that even gross negligence of the insured will not defeat a recovery in the absence of stipulations having such an effect. *Shaw v. Robberds* (1837), 6 Adol. & E. 75; *Insurance Co. v. Glasgow* (1844), 8 Mo. 713; *Johnson v. Insurance Co.* (1862), 4 Allen, 388; *Insurance Co. v. Parisot* (1878), 35 Ohio St. 35. In *Supreme Council, etc., v. Garrigus* (1885), 104 Ind. 133, 3 N. E. 818, it was ruled that where the insured engaged in a fight without fault on his part, in consequence of which he received injuries resulting in his death, the latter was an "accident," within the meaning of a benefit certificate. In view of the definitions and legal precedents above quoted and cited, and of the very general terms of the policy under consideration, we conclude that its reasonable and natural meaning includes within the term "accident" such a death as Lovelace met. Whether he acted lawfully as a guest of the hotel, during the absence and illness of the proprietor, in attempting to remove Graves from the hotel office by force, we think needless to investigate. It may be assumed that by his course of conduct he voluntarily assumed the risks of a fight; but there is nothing in the circumstances to show that he voluntarily assumed the risk of death. We consider his killing an "accident," in the popular and ordinary

sense in which that word is generally used. It certainly was an accident, so far as he was concerned. We do not doubt that such should be the construction given to the word in the contract in suit; and that, in so concluding, we give effect to the true purpose and intent of the parties to the document. The learned trial judge reached the same conclusion. The judgment is affirmed.

BLACK, C. J., and BRACE and MACFARLANE, JJ., concur.¹

2. EXTERNAL INJURY.

MCGLINCHY *v.* FIDELITY AND CASUALTY CO.

80 ME. 251. — 1888.

PETERS, C. J. — The plaintiffs, who are minor children, sue for one thousand dollars, an amount insured in an accident policy on the life of their father by the defendant company. The circumstances of the father's death were these: On a morning, while a resident of Calais, he was driving in a covered carriage, containing himself and his two small boys, on the principal public way in St. Stephen, N. B., when his horse, frightened at a load of hides passing the same way, suddenly sprang into a run, first jumping to the side of the way and nearly colliding with other teams, and ran a

¹ In *Bacon v. Accident Assoc.*, 123 N. Y. 304, the accident policy provided that it should not extend to death caused by disease. Death was caused by a malignant pustule upon the lip. The plaintiff contended that this pustule was not a disease but a "pathological condition" caused by the accidental infliction of putrid animal matter infected with bacilli anthrax which multiply and are diffused through the system. The defendant contended and the court held that the malignant pustule was an infectious germ disease, the court saying: "It seems to me clear that the meaning of the words used in the policy cover just such a case, and that the parties never intended that a cause of death which to all outward appearances and to the world in general was a disease, should be converted into a 'pathological condition' of the body caused by accident."

In *Western Commercial Trav. Assoc. v. Smith*, 85 Fed. 401, where death resulted from blood poisoning following an abrasion of the skin of a toe by wearing a new shoe, the court said: "Was the abrasion of the skin of the toe of the deceased the natural and probable consequence of wearing new shoes? It must be conceded that new shoes are not ordinarily worn with the design of causing abrasions of the skin of the feet, and the trial court has found that the abrasion upon the toe of the deceased was produced unexpectedly, and without any design on his part to cause it. An abrasion of the skin, certainly, is not the probable consequence of the use of new shoes; for it cannot be said to follow such use more frequently than it fails to follow it. Nor can such an abrasion be said to be the natural consequence of wearing such shoes, — the conse-

considerable distance before he was brought under control. The result was that there was no collision, nor was the carriage upset or any one thrown therefrom. Immediately afterwards the insured experienced great sickness and pain, and, going directly to his house, died in about an hour from the moment of the accident. He was in good health on that morning, before the accident, and there is no suggestion that he was not a person of generally sound and strong constitution. His business was that of a commercial traveler. The case is reported for our determination upon the law of the facts.

We think, on these facts, that the common judgment of men would instinctively declare, irrespective of the refinements which are often indulged in over primary and secondary causes, that here was a plain accident causing death, and that the company should pay the sum promised in the policy. In any reasonable view that can be taken of the series of happenings, our minds go to the same conclusion. We believe that the common-sense view is also the legal view. The company insures against death by accident. And as, in some cases, it is difficult to determine whether the death is caused by disease or accident, in order to prevent fraud or mistake, the company provides its own test by which the fact shall be ascertained. The leading provision of the policy is that those interested

quence which ordinarily follows, or which might be reasonably anticipated. How, then, can it fail to be the chance result of accidental means, — means not designed or calculated to produce it? If the deceased, without design, had slipped and caused an abrasion of his skin, as he was walking down the street or had punctured the skin of his foot by stepping on a nail in his room, or had pierced it with a nail in his shoe as he was drawing it upon his foot, there could have been no doubt that these injuries were produced by accidental means; and it is difficult to understand why an abrasion of the skin, produced unexpectedly and without design, by friction caused by wearing a new shoe, does not fall within the same category."

In *Accident Ins. Co. v. Crandal*, 120 U. S. 527, the question as stated by the court was: "Whether a policy of insurance against 'bodily injuries, effected through external, accidental and violent means' * * * and providing that 'this insurance shall not extend to death or disabling, which may have been caused wholly or in part by bodily infirmities or disease, or by suicide, or self-inflicted injuries;' covers a death by hanging one's self while insane." The court held (1) that "bodily" applies here to "diseases" as well as "infirmities" and that "in the common speech of mankind mental are distinguished from bodily diseases;" (2) that "suicide" and "self-inflicted injuries" cannot be predicated of an insane person, — that acts thus committed cannot with propriety be described as his acts. See also *Fidelity and Casualty Co. v. Johnson*, 72 Miss. 333, where death at the hands of a mob, by hanging, was held to have resulted through "external, violent and accidental means;" and also *Insurance Co. v. Bennett*, 90 Tenn. 256, upon accident insurance generally.

in the insurance, in order to establish the liability of the company, shall prove that death was caused "by bodily injuries effected through external, violent and accidental means," within the meaning of the contract. The company having chosen its definition of liability, and having the opportunity of annexing conditions which, usually, are not closely observed by persons accepting insurances, the meaning of the terms employed need not be enlarged or restricted for the benefit of the company, but should be liberally interpreted in favor of the insured.

Was the death in this instance caused by bodily injuries effected through external, violent and accidental means? Certainly there was an accident. The definition of accident, generally assented to, is an event happening without any human agency, or if happening through human agency, an event which, under the circumstances, is unusual and not expected to the person to whom it happens. This definition exactly fits the facts here. Argument cannot be necessary to satisfy any one that the injury happened by violent means. A well man suddenly meets a perilous emergency which taxes all his physical and mental strength, and his death is caused thereby in an hour.

The greater question is whether the death was caused by external means. We have no doubt it was. And really all the questions of the case may be resolved into the single inquiry as to what was the real cause producing death. And here a question of fact must to some extent be determined. The testimony is meager. Possibly the counsel for the plaintiffs relies on the preliminary proofs of loss as evidence in chief, which are fuller than the general testimony, but that is not allowable. Leaving the proofs of loss to serve only the proper purpose for which they could be introduced, all the evidence we have, more than the facts already stated, is that the insured became deathly sick, and after death a discoloration appeared on the surface of the body in the region of the heart. There is no pretense that the body bore any marks of contact with anything inflicting injury, or that it came in contact with any physical object during the time of the accident. Our belief is, on the facts legitimately before us, that death was produced by a ruptured blood vessel about the heart, and that such rupture was caused by the extraordinary physical and mental exertion which the deceased put forth to save his children and himself from injury. The physical strain and mental shock was more than he could bear. In this calculation of the facts we come easily to the conclusion that, as between these parties, physical and external causes effected death. The misconduct of the horse, and inseparably connected therewith

the conduct of the man on the occasion, in his effort to avoid the threatened catastrophe, brought death.

The defendants, however, do not agree to this version of the facts. They contend that death was produced purely by fright, and not by the aid of any physical means whatever, and that the means through which death was produced must be considered as internal only. But if it is to be admitted that death was caused through fright, even then we are just as strongly convinced it was also caused by external means. Whether one thing or another shall be considered the proximate cause depends upon the relation of the parties to the suit with each other, as well as upon other circumstances. If the death be laid to fright, it must be because fright produced bodily injury, and the means which produced fright were external. It is impossible to impute the death to fright without an explanation of the circumstances or situation which produced the fright. Suppose any person inquires of another what caused the death of a friend, and the answer be that he died from fright. Would the question be more than half answered? Would not the inquirer immediately and instinctively ask the cause of the fright? In most conditions, and in almost every sense, fear is an effect of something merely. There must be some active cause behind it. In the present case it was no more than an agency through which the accident acted. It was a dependent and not independent factor in the series of operating forces. It was no more the real cause of the death than a hammer in the hands of a workman, who strikes a blow with it, is the cause of such blow. The efficient, true cause, dominating all other causes in the combination, was the misbehavior of the running horse. Subsequent occurrences were merely the instrumentalities through which the real cause spent its force. The act of the horse was the beginning, death was the end. * * *

Then there are cases more directly touching the question as to whether the injuries in the case at bar were produced by external means or not. It has been held that an insane man who takes his own life dies from an injury produced by external, accidental and violent means. *Accident Ins. Co. v. Crandal*, 120 U. S. 527. Same result follows when death ensues from accidental drowning. *Trew v. Assurance Co.*, 6 H. & N. 845; *Winspear v. Accident Ins. Co.*, 6 Q. B. Div. 42. Accidentally inhaling coal gas, causing death, entitles a recovery upon a policy like the present. *Paul v. Traveler's Ins. Co.*, 45 Hun, 318.¹ A death from blood poisoning, produced by virus communicated to the hand by a fly, comes within the

¹ Affirmed, 112 N. Y. 472.

terms of such a policy. *Bacon v. U. S. Mut. Accident Ass'n*, 44 Hun, 599.¹ The latter case has been criticised upon the point whether the means in that instance were violent or not. In *Insurance Co. v. Burroughs*, 69 Penn. St. 43, the court says: "If the injury be accidental and the result is death, what matters it whether the injury is caused by a blow from a pitchfork or from a strain in handling it." In these cases it was held that the true cause of the death came from the outside, were external means. Upon principle, we think the same decision must be reached here.

Another point of defense is taken. By a subsidiary, conditional clause in the policy it is provided that the insurance "does not extend to any *bodily injury* of which there shall be no external and visible sign upon the body of the insured." This does not apply to fatal injuries, but only to those not resulting in death. It would be utterly unjust if this condition applied in cases of death. It would preclude recovery in all instances where death occurs by drowning, freezing, poisoning, suffocation, concussion, means of death leaving no outward mark, and also where the insured has been killed and his body is missing. The context shows that the clause is only applicable to injuries not resulting in death. The policy declares that the insurance shall not extend to *bodily injuries* unless the external sign of injury is visible, "nor to *any death* caused" in certain ways named. There are reasons for the condition applying to a surviving claimant. He has unusual chance for feigning an internal injury, if disposed to defraud the insurers. But no such protection is required where the accident causes death. The dead body is external and visible sign enough that an injury was received. *Mal-lory v. Travellers' Ins. Co.*, 47 N. Y. 52; *Paul v. Travellers' Ins. Co.*, 45 Hun, 318.

Defendants defaulted.

WALTON, VIRGIN, LIBBEY, FOSTER, and HASKELL, concurred.

¹General Term of the Supreme Ct., 1887, reversing a judgment entered upon a verdict directed for the defendant, and granting a new trial. Upon the new trial there was a verdict for the plaintiff; defendant appealed to the General Term of the Supreme Ct., but the judgment was affirmed. 20 N. Y. State Reporter, 204. An appeal was taken to the Court of Appeals and the judgment was reversed and a new trial ordered. 123 N. Y. 304. See digest of this case *ante*, p. 277, note.

3. PROXIMATE CAUSE.

FREEMAN v. MERCANTILE MUTUAL ACCIDENT ASSOC.

156 MASS. 351. — 1892

KNOWLTON, J. — The plaintiff claims under a policy or certificate of insurance issued to Knowles Freeman, containing a provision for payment to her of a sum not exceeding \$5,000 in case of his death from an accident, and also a provision for a weekly payment to him as an indemnity against loss of time if he should be disabled by an accident. The condition on which the plaintiff is entitled to payment is stated in the policy to be upon "proof that said Knowles Freeman shall have sustained, during the continuance of his membership, bodily injuries effected through external, violent and accidental means, within the intent and meaning of the by-laws of said association, and the conditions herein recited, and such injuries alone shall have occasioned death within ninety days from the happening thereof." The first part of the second paragraph of the conditions above referred to is as follows: "That benefits under this certificate shall not extend to any case in which there shall be no symptom or visible sign of bodily injury; nor to any case in which death or disability occurs in consequence of disease, or which may have been caused by any surgical operation, or medical or mechanical treatment, unless the said operation or treatment shall have been undertaken for the relief of injuries which entitle the member to the benefits of this association, nor to any case except where the injury is the proximate cause of the disability or death."

It was proved that Knowles Freeman died of peritonitis localized in the region of the liver, and the evidence tended to show that it was induced by a fall. There was also evidence indicating that he had previously had peritonitis in the same part, and that the previous disease had produced effects which rendered him very liable to a recurrence of it. The report presents questions arising on the defendant's requests for rulings which relate to the portions of the policy above quoted. The defendant contends that it is not liable in case of a death from disease, even if the disease is caused by an accident. The principal question in the case is, What kind of cause is to be deemed proximate within the meaning of the policy? Where different forces and conditions concur in producing a result, it is often difficult to determine which is properly to be considered the cause, and, in dealing with such cases, the maxim, *causa proxima non remota spectatur*, is applied. But this does not mean that the

cause or condition which is nearest in time or space to the result is necessarily to be deemed the proximate cause. It means that the law will not go farther back in the line of causation than to find the active, efficient, procuring cause, of which the event under consideration is a natural and probable consequence, in view of the exciting circumstances and conditions. The law does not consider the cause of causes beyond seeking the efficient predominant cause, which, following it no farther than those consequences that might have been anticipated as not unlikely to result from it, has produced the effect. An injury which might naturally produce death in a person of a certain temperament or state of health is the cause of his death, if he dies by reason of it, even if he would not have died if his temperament or previous health had been different; and this is so, as well when death comes through the medium of a disease directly induced by the injury, as when the injury immediately interrupts the vital processes.

Most of the requests for rulings were founded upon a different theory of law, and were rightly refused. On this part of the case the presiding justice, after having explained and elaborated his views, summed up as follows: "Upon the question as to whether peritonitis, if that caused his death, is to be deemed a disease within the meaning of this policy, and the proximate cause of death within the meaning of this policy, so as to prevent a recovery, depends the question whether or not before the time of the fall, and at the time of the fall, he had then the disease — was then suffering with the disease. If he was, then in the sense of the policy, although aggravated and made fatal by the fall, he cannot recover. But if, owing to existing lesions caused by that disease, but not having the disease at the time, the same kind of malady, that is, peritonitis, was started up, the company are to be answerable, although, if there had been a normal state of things the fall would not have occasioned such a result." This ruling gives an interpretation to the language of the policy which is in accordance with the apparent purpose and intention of the parties, and which makes the contract a beneficent provision for the beneficiaries named in it. It is also in harmony with the general course of decisions. *Marble v. Worcester*, 4 Gray, 395, and cases cited. *McDonald v. Snelling*, 14 Allen, 290; *Perley v. Eastern Railroad*, 98 Mass. 414; *Metallic Compression Casting Co. v. Fitchburg Railroad*, 109 Mass. 277; *National Benefit Association v. Grauman*, 107 Ind. 288; *North American Ins. Co. v. Burroughs*, 69 Penn. St. 43; *Sheanon v. Pacific Ins. Co.*, 77 Wis. 618; *Insurance Co. v. Tweed*, 7 Wall. 44; *Insurance Co. v. Seaver*, 19 Wall. 531. To

adopt the view contended for by the defendant would make the policy worthless to beneficiaries in many cases of death where an injury resulting from an accident was the efficient cause. * * *

Judgment on the verdict.¹

4. VOLUNTARY EXPOSURE.

BURKHARD v. TRAVELLERS' INS. CO. OF HARTFORD.

102 PA. 262. — 1883.

CHIEF JUSTICE MERCUR * * * The business of this company is to insure against accidents. The purpose of this policy is to pay specific damages for bodily injuries and death caused by external, violent and accidental means. The death of the intestate was so caused. The company seeks to avoid liability under two clauses in the policy. One provides the insurance shall not extend to a case of death or injury caused by "voluntary exposure to unnecessary danger;" the other that "walking or being on the road-bed or bridge of any railway are hazards not contemplated or covered by

¹ In the *Travelers' Ins. Co. v. Melick*, 65 Fed. 178, the company insured Dr. Robbins against death resulting from bodily injuries effected through external, violent and accidental means alone, independent of all other causes; the policy providing that the insurance did not cover suicide, sane or insane; nor accident, nor death, resulting wholly or partly from disease or bodily infirmity; or from intentional injuries inflicted by the insured or any other person.

There was evidence that the doctor accidentally sent a bullet through the fleshy portion of his foot, June 1, 1890; that the wound thus caused became very painful, confined him to his bed, caused a fever, and gradually reduced his strength, until he died, June 18, 1890; that this gunshot wound was just such an injury as would naturally produce tetanus or lockjaw; that the doctor and his physicians feared that disease from the first, and that they used chloral and chloroform to relieve the pain and ward off this disease; that in the early morning of June 18, 1890, while the deceased was alone in his room, he was seized with tetanus; that this disease causes the most excruciating pains that human beings ever suffer; that it is fatal in a vast majority of cases; that it produces spasms or convulsions, and sometimes causes death by a spasm of the larynx, which prevents the passage of air through the trachea to or from the lungs; that the doctor was found dead in his bed, June 18, 1890, with a scalpel in his right hand, and his trachea and both his jugular veins cut; that the tetanus was sufficient to produce his death, and the throat-cutting was sufficient to produce it. The question of proximate cause was left to the jury, and a verdict was rendered for plaintiff. Defendant appealed; judgment below affirmed, the court saying: "It is assigned as error that the court below refused to instruct the jury to return a verdict for the insurance company; and it is contended that the question whether the shot wound which caused the tetanus

this contract, and no sum will be paid for disability or loss of life, in consequence of such exposure, or while thus exposed."

The insured was traveling by rail through Indiana on his way to Kentucky. The train stopped on the bridge across the Ohio river by reason of the draw part of the bridge being open. He went to the front platform of the coach in which he was riding, and stepped off, and through a hole in the floor of the bridge, causing his death. This hole was about three feet wide and four feet long. It was caused by the removal of some planks during the making of repairs.

1. Was this act of the insured a voluntary exposure to unnecessary danger?

To make him guilty of a "voluntary exposure to danger" he must intentionally have done some act which reasonable and ordinary prudence would pronounce dangerous. The uncontradicted evidence shows that several other passengers got out of the coach, and some of them in advance of the insured. They certainly apprehended no danger. It is customary for male passengers to alight when a train stops for any length of time. No notice was given to passengers that it was dangerous to get out of the coach where it stood. So far as appears, the bridge, with the exception of this hole, was well covered with plank and entirely safe. When the

nus, or the throat cutting, was the proximate cause of the death, was a question of law for the court. * * * This question was peculiarly one of fact. The insurance company had agreed to pay the promised indemnity for any death that resulted from the accidental shot wound alone. The question was, what did in fact cause the death, — the shot wound, the cutting, or both? Nor would this case be withdrawn from the effect of this rule if the evidence upon this question was undisputed, for the question is always for the jury where a given state of facts is such that reasonable men may fairly differ upon it. It is only when all reasonable men, fairly exercising their judgments, must draw the same conclusion from an admitted state of facts, that it becomes the duty of the court to withdraw a question of fact from the jury. * * * It must be borne in mind that the doctrine of proximate cause has a different relation to an action for negligence from that which it bears to a contract to indemnify for the result of a given cause. In the former it measures the liability, while in the latter the contract fixes the extent of the liability. In an action for negligence the liability extends only to the natural and probable consequences of the negligent act. In the case in hand the contract is to indemnify the insured against death that shall result within ninety days from accidental bodily injuries alone. The company was undoubtedly liable under this contract for the death of the insured if that death did in fact result from the accidental shot wound alone. The crucial question was whether or not it did in fact so result, and the doctrine of proximate cause was applicable to this case only to aid in finding a just answer to this question, and not to measure the liability which the contract had fixed."

See also *Travelers' Ins. Co. v. Murray*, 16 Col. 296.

intestate alighted other passengers were standing on the bridge near the brakeman. The latter was sitting on timber that was lying on the foot-walk of the bridge, and was to be used in the repairs being made. The passengers had no knowledge of these repairs. The brakeman held his lantern so placed on the floor that another timber cast its shadow over this hole making it impossible for the insured to see it. He could see that portion of the floor lighted by the lantern, and the passengers standing thereon. He could see the brakeman near them. He stepped out of the coach in plain sight of the brakeman. He had a right to suppose he would land on a floor as firm as that on which the others stood. Neither word nor sight gave him any notice of danger. He did not approach the opening caused by the draw, and was not injured thereby.

It is true he voluntarily left the car; but a clear distinction exists between a voluntary act and a voluntary exposure to danger. Hidden danger may exist; yet the exposure thereto without any knowledge of the danger does not constitute a *voluntary* exposure to it. The approach to an unknown and unexpected danger does not make the act a voluntary exposure thereto. The result of the act does not necessarily determine the motive which prompted the action. The act may be voluntary; yet the exposure involuntary. The danger being unknown, the injury is accidental. Accident is defined by Worcester to be an event proceeding from an unknown cause or happening without the design of the agent; an unforeseen event; incident; casualty; chance; and by Webster, an event that takes place without one's forethought or expectation; an event which proceeds from an unknown cause or is an unusual effect of a known cause, and therefore not expected; chance; casualty; contingency. In view of the unquestioned facts, the death of the intestate was accidental. The danger was unknown. The injury was not designed. We think there was not such a voluntary exposure to danger as to fairly bring the act of the insured within the meaning of the exception. * * *

¹ In *Equitable Accident Co. v. Osborn*, 90 Ala. 201, one of the exceptions, not covered by the accident policy, was "voluntary exposure to unnecessary danger." The court said (p. 206): "The evidence in the record fails to satisfy us that the insured was guilty of voluntarily exposing himself to unnecessary danger, and any degree of negligence short of this will not operate to defeat a recovery. May on Insurance (2d ed.), § 530. He was approaching the arriving railway train, for the purpose of getting the mail for the postmaster. True, he was moving rapidly. But he made an effort to check his speed, as he reached the sloping bank which led down to the side track of the railroad; and in doing this, he stumbled, and came in collision with the engine. But for the accident

5. POISON.

TRAVELERS' INSURANCE CO. v. DUNLAP.

160 ILLS. 642. — 1896.

ACTION upon an accident policy. The policy provided that the insurance did not cover death resulting from "taking poison."

MR. JUSTICE CARTER. — It is settled by the judgments below that the death of the insured was caused by accident. Mistaking a bottle of carbolic acid for peppermint, which he wished to take for some ailment, he poured a portion of the acid into a glass of water, drank it, and died from the poison. The only question presented for our decision is, is the appellant exempted from liability on the ground that the insured died from "taking poison," within the meaning of the policy? Appellant contends that it is so exempt by the terms of the contract; that the term "taking poison," as used in the policy and according to its ordinary signification, includes accidental as well as intentional taking, and cites *Pollock v. United States Mutual*

of stumbling, the inference is fair that he would not have been injured. The efficient and proximate cause of the death, therefore, was the accident, as much as if the collision had been with a huge stone, instead of with the steam-chest on the side of the engine."

In *Cornwall v. Assoc.*, 6 N. D. 201, an attempt, while hunting, to scale a bank with a loaded gun in hand was held not a voluntary exposure to unnecessary danger. In *Tucker v. Co.*, 50 Hun, 50, there was the same holding where the insured, a farmer, living on the shore of Lake Ontario, lost his life by the capsizing of a boat while on a mission of rescue during a storm. See also *Tuttle v. Co.*, 134 Mass. 175.

In *Stone v. U. S. Casualty Co.*, 34 N. J. L. 371, an action upon an accident policy, the policy provided "the party insured is required to use all due diligence for personal safety and protection." Upon this point the court said: "It was insisted that the assured did not use due diligence for his personal safety and protection. The circumstances were these: The assured was having a small barn put up, and while the same was building, had gone up to the second story to look on at the work. Stepping to one side he trod upon a joist which, from a concealed defect, broke, and he was killed by falling to the ground. At the time of the accident he was heavily clad in two overcoats and was said to be an awkward man. These facts do not show any disregard to his personal safety, on the part of the assured. There was no rashness or undue exposure in placing himself in the position described, and the breaking of the timber, which was the proximate cause of the death, was a pure accident. Besides, this was altogether a question for the jury, and they were instructed in the language of the charge to 'take all the circumstances into consideration in determining, as a question of fact, whether his exposure was such as a prudent man would not subject himself to, and whether he exercised that degree of care which would be required of a prudent man.' The verdict in favor of the assured, on this point, is amply warranted by the proofs."

Accident Ass., 102 Pa. St. 230, which so holds. Appellee, however, contends (and in this she is supported by the Appellate and Circuit Courts), that the words "taking poison," as employed in the policy and in view of the rules of construction applied by the courts to such instruments, mean the voluntary, intentional taking of poison, and do not include cases of accidental poisoning; and counsel contend that this court has, in effect, so decided in *Healey v. Mutual Accident Ass.*, 133 Ill. 556. While the precise point here at issue was not discussed in the opinion in the Healey case, yet it was involved in the decision, and is within the reasoning there employed. The leading cases on this subject were reviewed in the Healey case, including *Paul v. Travellers' Ins. Co.*, 112 N. Y. 472, and *Pollock v. United States Mutual Accident Ass.*, *supra*, and it was then said, (p. 564): "While we recognize the high ability of the court in which the case" (the Pennsylvania case) "was decided, we are not disposed to follow the rule there adopted. We think the rule established by the Court of Appeals of New York one better calculated to carry out the true intention of the parties when the contract of insurance was entered into, and one, too, more nearly in harmony with the current of authority bearing on the question." See, also, *Pickett v. Pacific Mutual Life Ins. Co.*, 144 Pa. St. 79; *Muncilly v. Employers' Liability Ass. Corp.*, 148 N. Y. 596.

We are inclined to the opinion that the term, "taking poison," would also, in common parlance, when used without any qualifying words, be understood to mean an intelligent and conscious act. If, in speaking of the cause of the death of another, we should say, "he took poison," we would most commonly be understood to mean that his act in taking poison was intentional, rather than accidental, and it would hardly be deemed necessary to say "he intentionally took poison," and if it were designed to avoid such understanding we would naturally say "he accidentally took poison," or would use some other qualifying words indicating that the act was accidental or its cause doubtful or unknown. It must, however, be conceded that the meaning of the term in the respect mentioned is not free from doubt. Able and learned arguments have been made on each side of the question by counsel, and cases are cited showing that courts of high authority do not agree on the subject. It would, therefore, seem to be eminently proper, in such a case, to apply the well-known rule of construction applicable to such instruments, that where there is a doubt or uncertainty as to the meaning of the terms employed, the language, being that of the insurer, must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to indemnity, which, in making

the insurance, it was his object to secure. *Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 644; *Healey v. Mutual Accident Ass.*, *supra*; *May on Insurance*, § 175.

Counsel for appellant insist that, using their own language, "an exception from an accident policy can only be of some accident otherwise included within it, for if the cause of injury or death be not accidental, it is manifestly not within the scope of the policy at all. Hence an exception of 'taking poison' means, *ex vi termini*, the exception of an accidental taking of poison." It is clear, however, that the so-called exception is something more than a mere exception excluding what would otherwise be included as accidents, for suicide by a sane person could not be said to be an accident, yet it, with other causes of death and injury not accidental, is embraced in the exception.

It is also said that the term "taking poison" cannot be limited in its meaning to the intentional taking of poison, for the reason that death so caused is covered by the clause relating to suicide, and to so construe it would give no force whatever to the words "taking poison." Counsel are mistaken also in this contention. When the entire provision in which these words occur is considered, it is too clear for argument that it is recognized that death may result wholly or partly, directly or indirectly, from voluntarily taking poison without any suicidal intent, and that death so caused, while excepted from the risks covered by the policy, would not be so excepted by the suicide clause. Besides different kinds of accidents and injuries not resulting in death caused by the voluntarily taking of poison, might be excluded from such risks by this provision. It would not be difficult for the insurer to use language which, in respect to the question here under consideration, would be free from doubt. A policy of insurance should not be so framed as to be susceptible of one construction in the hands of the soliciting agent, and of quite a different one in the hands of the adjuster.

Finding no error in the record the judgment of the Appellate Court is affirmed.

Judgment affirmed.¹

¹ *Contra* is *McGlother v. Co.*, 89 Fed. 685, where the exception clause was "death * * * resulting from poison;" and also *Early v. Co.*, 113 Mich. 58, the court saying: "We have not overlooked *Travelers' Ins. Co. v. Dunlap*, 160 Ill. 642. But in the present case, the expression is 'death by poison.' We know of no case which goes to the extent of holding that such an expression in the exception contained in the policy does not avoid it."

6. INHALING GAS.

PICKETT *v.* PACIFIC MUTUAL LIFE INS. CO.

144 PA. 79. — 1891.

ACTION upon an accident policy.

MR. JUSTICE STERRETT. — The undisputed facts, upon which the jury in this case was instructed to find for the plaintiff the full amount of his claim, are briefly as follows:

On June 4, 1889, the plaintiff's intestate, John W. Moore, received and paid for the policy of insurance on which this suit was brought, a copy of which will be found in the record. Returning to his boarding house the same evening he informed his landlady that he had had no dinner, and requested that his supper be prepared. He then went to the well in the open yard for a drink, and finding that the pump required prining with water, he remarked that he would fix it, so as to obviate that difficulty in the future. After procuring a hatchet, and removing planks from the opening at the top, he descended into the dug-out portion of the well, which was four or five feet wide and only ten or twelve feet deep, for the purpose of closing a small opening in the iron pipe, about midway down. A few minutes later his lifeless remains were found at the bottom of the well. He died from asphyxia or suffocation due to the accidental and unconscious inhalation of carbonic acid or other deadly gas that had unexpectedly accumulated in the dug-out portion of the shallow well. The well, with which deceased was familiar, and in which he had been shortly before, was one of those known as a "driven well," made by driving an iron pipe into the ground to the depth, in this case, of about forty feet. For the distance of about ten or twelve feet from the top the earth around the iron pipe was dug out so as to form, as above stated, an open well of about four or five feet in diameter, in which there was little or no water. The top of the well was covered with plank. The deceased was a strong, healthy man.

His sudden and wholly unexpected death, under the circumstances above stated, and within a few hours after he had procured the policy of insurance, undoubtedly resulted from external, violent, and accidental injuries or means, and without any conscious or voluntary act on his part. There was no evidence, nor was it even suggested, that he had committed suicide, or that he was wanting in reasonable care, or that he voluntarily exposed himself to danger. In describing the condition in which he found the body of deceased the physician who made the post-mortem examination testified: "The general surface of the body was of a livid bluish

color. The lips and tongue were blue. The right side of the head was partially distended with dark blood; the left side was nearly empty. The lungs contained more blood than they would under different circumstances; they were somewhat congested. The pulmonary arteries were distended with blood. The liver was slightly congested, and also the kidneys; there was, however, no disease of the kidneys, no disease of any of the internal organs. * * * His death was caused by asphyxia, due to the inhalation of gas." If the latter undisputed and undoubtedly correct conclusion of fact needed any confirmation, it may be found in the testimony as to the effect of the same noxious gas on those who went to the relief of the deceased, and assisted in removing his remains from the well. It shows how narrowly they escaped a similar violent and accidental death. * * *

In view of the undisputed facts, of which the above is an outline, the learned president of the Common Pleas refused to affirm defendant's points for charge, some of which are predicated of the foregoing facts, and instructed the jury that upon the undisputed facts before them the plaintiff was entitled to recover, and there was accordingly a verdict and judgment in his favor. This action of the court in refusing defendant's points, and instructing the jury in plaintiff's favor, are the subjects of complaint in the several specifications of error.

The first and main point was as follows: "The clause in the policy of insurance sued on, to wit, 'This insurance shall not cover * * * death or injury resulting from or attributable partially or wholly to * * * inhalation of gas,' applies to the case of death resulting from asphyxia caused by inhaling gas accumulated at the bottom of the well." This, in connection with the remaining seven points, was rightly refused. According to the undisputed facts above referred to, the death of the insured was caused by external, violent, and accidental means, and without any conscious or voluntary act on his part. No one, knowing, as he did, the shallowness of the dug-out portion of the well, would ever suspect the presence of noxious gas therein. Doubtless, he never for a moment contemplated the slightest danger. His death was purely accidental; quite as much so as if he had been suddenly and unexpectedly engulfed in water and drowned. The deadly but invisible gas by which he was unconsciously and accidentally enveloped was undoubtedly the external and violent cause of his injury and death. According to the physician's testimony above quoted, its violent effect upon the vital organs of the deceased was plainly visible at the time of the post-mortem examination.

As was well said in *Paul v. Insurance Co.*, 112 N. Y. 472, which in principle rules this case: "As to the point raised by appellant, that the death was not caused by external and violent means, within the meaning of the policy, we think it a sufficient answer that the gas in the atmosphere, as an external cause, was a violent agency, in the sense that it worked upon the intestate so as to cause his death. That a death is the result of accident, or is unnatural, imports an external and violent agency as the cause." In that case the policy on which suit was brought provided that the insurance should not extend to death caused "by inhaling gas." It appeared that the insured was found dead in bed. Gas had escaped in the room, and death was caused by breathing the atmosphere of the room filled with gas. It was held that death was not caused by the inhaling of gas, within the meaning of the policy. The company relied upon the same narrow and technical defense that is made by the defendant in this case. In an able opinion, reported in 45 Hun, 313, the learned judge of the General Term, whose judgment was afterwards affirmed by the Court of Appeals, said, *inter alia*: "Was the death of the intestate caused by or through 'external, violent and accidental means,' within the language of the policy? * * * We should say the death was due to external and violent means as clearly as drowning. * * * The cause of death came from outside, as surely as would a rifle ball, or water in the case of drowning. The escape of gas into the room was violent, in the same sense that would be the flow of water into a wrecked vessel. In either case the external means constitute the cause which produces death. It is a violent death, produced by an external power, not natural. Some poisons, such as opium and chloral, produce no violent action on the human system. The man who descends into a well of carbonic-acid gas is killed with no greater violence, perhaps, than was the intestate. Yet in all these cases the result would be called a violent death. * * * We also think the words 'inhaling of gas' were used to designate those common uses of gas in dentistry, surgery, etc. * * * Evidently an exception from death caused by a surgical operation was not broad enough to include the use of anæsthetics preparatory to the operation. It contemplated a voluntary and intelligent act by the assured, not an involuntary and unconscious act."

On this question the Court of Appeals, in affirming the decision of the General Term, said: "A careful consideration of this instrument, and of the scope and design of its provisions, leads us to the conclusion that appellant must fail in its contention. * * * In expressing its intention not to be liable for death from 'inhaling of

gas ' the company can only be understood to mean a voluntary and intelligent act of the insured, and not an involuntary and unconscious act. Read in that sense, and in the light of the context, these words must be interpreted as having reference to medical or surgical treatment, in which, *ex vi termini*, would be included the dentist's work or a suicidal purpose. Of course, the deceased must have, in a certain sense, inhaled gas; but, in view of the finding that death was caused by accidental means, the proper meaning of the words compels, as does the logic of the thing, the conclusion that there was not that voluntary or conscious act, necessarily involved in the process of inhaling. An accident is the happening of an event without the aid and the design of the person, and which is unforeseen. * * * To inhale gas requires an act of volition on the person's part before the danger is incurred. Poison may be taken by mistake, or poisonous substances may be inadvertently touched; but, whatever the motive of the insured, his act precedes either fact. * * * If the policy had said that it was not to extend to any death caused wholly or in part by gas, it would have expressed precisely what the appellant now says is meant by the present phrase, and there could have been no room for doubt or mistake. Policies of insurance are to be liberally construed, and, as in all contracts, conditions are to be construed strictly against those for whose benefit they are reserved."

The principles, so well stated and enforced in the cases above cited, were afterwards approvingly considered in *Bacon v. Association*, 123 N. Y. 304. In further support of the same principles, reference might be made to other authorities, among which are: *May on Insurance*, 631, in which reference is made to *Trew v. Assurance Co.*, 6 H. & N. 839; *Winspear v. Insurance Co.*, 6 Q. B. D. 42 (29 Eng. R. 488); *Insurance Co. v. Crandal*, 120 U. S. 532; *Mallory v. Insurance Co.*, 47 N. Y. 52; *North American Ins. Co. v. Burroughs*, 69 Pa. 43; *McGlinchey v. Casualty Co.*, 80 Me. 251; *Eggenberger v. Association*, 41 Fed. R. 172; *U. S. Mut. Ass'n v. Newman*, (Va.) 3 S. E. Rep. 805; but further elaboration is unnecessary.

This case is not ruled by *Pollock v. Accident Ass'n*, 102 Pa. 230, on which defendant relies. While that case may well stand upon its own peculiar facts, we think the present case is clearly distinguishable in its controlling facts, as well as in the principles applicable to them. In that case the injury did not result from external, violent, and accidental means. The fatal drug was voluntarily and intentionally taken by the deceased. In deciding that case this court never could have intended to lay down the broad rule that in construing an accident policy there is no distinction between external,

violent, and accidental causes of death, and those cases in which death results from voluntary acts. What was decided in that case was that, under the various clauses of the policy sued on, there could be no recovery, and it was unimportant whether the means arose from the designing act of the insured or otherwise. * * *

Without further referring to the specifications of error, it is sufficient to say that neither of them is sustained. The deceased was accidentally, violently, and fatally asphyxiated by the unknown presence of a fluid foreign to his person. If that fluid had been oil, smoke, water, or molten metal, the result would have been substantially the same. Death caused, not so much by the inhalation of the fluid as by its action in excluding life-supporting air, would have inevitably resulted. A fair construction of the policy leads to the conclusion reached by the court below, that death resulting from causes such as killed the intestate is not within any of the exemptions relied on by the company.

Judgment affirmed.

7. OVER-EXERTION.

RUSTIN *v.* STANDARD LIFE AND ACCIDENT INSURANCE CO.

79 N. W. 712 (NEB.)—1899.

ACTION on an accident policy issued to plaintiff and containing a stipulation exempting the defendant from liability for injuries occasioned by unnecessary lifting and voluntary overexertion.

Plaintiff, the president of a pleasure resort, was injured by lifting a dumbbell purporting to weigh 450 pounds, used by a performer at his resort. Plaintiff testified that he was in good physical condition at the time, that in his opinion the dumbbell did not weigh over 300 pounds, and that his purpose in lifting it was to detect that the bell was under weight and so protect his resort and the public from imposition. The trial court, at the conclusion of plaintiff's testimony, instructed the jury to find for the defendant. Plaintiff appeals.

SULLIVAN, J. — * * * Rustin's injury, it is true, was the natural result of overexertion while attempting to raise the dumbbell and bring it to a horizontal position; but that fact is not of itself conclusive in favor of the company. The contract right to indemnity was not lost because the injury resulted from overexertion unless the overexertion was conscious and intentional. *Indemnity Co. v. Dorgan*, 7 C. C. A. 581, 58 Fed. 952; *Johnson v. Accident Co.*

(Mich.) 72 N. W. 1115. Surely, it cannot be said as a matter of law that the plaintiff was aware of the probable result of his act, or that he acted with a reckless disregard of consequences likely to ensue. That he failed to accurately gauge his own strength, or else to correctly estimate the weight of the dumbbell, is evident; but accident insurance is not designed to furnish indemnity only in cases where the policy holder orders his conduct with grave circumspection, and a provident foresight of consequences. Mere contributory negligence is no answer to an action on a contract of insurance. Neither is there any absolute inference that the lifting was unnecessary. According to the plaintiff's testimony, the act was the product of a reasonable motive, and was performed in the line of duty. * * * Circumstances in evidence discredit the reason given for the lifting, but they do not indisputably condemn it as false. The question was for the jury to determine. The judgment is reversed and the cause remanded.¹

8. INTOXICANTS.

UNION MUTUAL LIFE INS. CO. v. REIF.

36 OHIO ST. 596. — 1881.

THE action below was founded upon a policy of insurance upon the life of Charles Reif. It is averred that the following answers made by Charles Reif in his application, were false and untrue: "Has the party whose life is to be insured ever been intemperate?" Answer: "No." "Is the party now of correct and temperate habits?" Answer: "Yes."

JOHNSON, J. — The ninth request was that if the jury found that

¹ "This action is brought upon an 'accident policy' issued by the defendant to the plaintiff, and is to recover for injuries sustained while riding in a bicycle race. The following provision was contained in the policy: 'This insurance shall not extend to or cover * * * injury resulting from * * * voluntary over-exertion, either voluntary or unnecessary exposure to danger, or to obvious risk of injury.' * * * It cannot be said, as a matter of law, that the plaintiff was over-exerting himself, nor that he voluntarily exposed himself to danger by entering into the race. Different, and equally intelligent and unbiased men might fairly differ in opinion as to whether or not, by taking part in such a race any risk of injury was necessarily incurred, and we think the court was right in leaving the decision of that question to the jury. *Hart v. H. R. Bridge Co.*, 80 N. Y. 622; *Salt Springs Nat. Bank v. Sloan*, 135 Id. 371-383." — *Keefe v. Soc.*, 4 App. Div. (N. Y.) 392.

the applicant was, before the date of his application, *addicted to periodical spreeing or getting drunk*, without the knowledge of the company or its agents, the policy would be void, even though there were periods of longer or shorter duration in which he was duly sober. The eleventh was in substance the same, that, if "he was in the *habit of periodically getting drunk*, even though there were times and occasions of longer or shorter duration in which he was duly sober," the policy was void. Each of these requests was refused, and in lieu thereof the court charged that it was obvious that these questions are not, whether the insured was ever drunk, or whether he ever used intoxicating liquors; "but whether he was ever intemperate, that is, whether at any period of his life his usual and *daily habits* were such as to constitute and render him what is known as an intemperate man — *a man habitually under the influence of intoxicating liquor.*"

An occasional excess in the use of intoxicating liquor does not, it is true, constitute a *habit*, or make a man intemperate, within the meaning of this policy; but if the habit has been formed and is indulged in of drinking to excess and becoming intoxicated, whether *daily and continuously*, or *periodically*, with sober intervals of greater or less length, the person addicted to such a habit cannot be said to be of temperate habits, within the meaning of this policy. In view of the fact that the evidence strongly tended to show that it was the habit of the insured to indulge to excess at frequent times, and did not tend to show a case of daily or continuous state of intoxication, this charge was clearly misleading. From it the jury might well understand, and in view of the whole evidence, we think, may reasonably have understood, that Charles Reif was of correct and temperate habits, although it was his habit to get drunk periodically and frequently, with sober intervals of longer or shorter duration. The habit of using intoxicating liquors to excess is the result of indulging a natural or acquired appetite, by continued use, until it becomes a customary practice. This habit may manifest itself in practice by daily or periodical intoxication or drunkenness. Within the purview of these questions it must have existed at some previous time, or at the date of the application, but it is not essential to its existence that it should be continuously practiced, or that the insured should be daily and habitually under the influence of liquor. Where the general habits of a man are either abstemious or temperate, an occasional indulgence to excess does not make him a man of intemperate habits. But if the habit is formed of drinking to excess, and the appetite for liquor is indulged to intoxication, either constantly or periodically, no one will claim that his habits are

temperate, though he may be duly sober for longer or shorter periods in the intervals between the times of his debauches. * * *

Judgment reversed and cause remanded for a new trial.¹

SHADER *v.* RAILWAY PASSENGER ASSURANCE CO.

66 N. Y. 441. — 1876.

ACTION to recover the amount of an accident insurance policy issued by the defendant in favor of one Wesley Shader. After the policy was issued Shader dined with a friend. During the dinner he and his friend were talking about shooting. Shader said his friend "could not shoot a frog;" the latter responded that he "could shoot his (Shader's) ear." The latter told him he might try "for ten cents." He did try and killed Shader. Both men were under the influence of intoxicating drinks at the time.

MILLER, J. — The question arising directly upon this appeal relates to the charge of the judge and to his refusal to charge as requested by the counsel for the defendant. The policy provided that: "No claim shall be made under this policy where the death or injury may have happened while the insured was, or in consequence of his having been, under the influence of intoxicating drinks." The judge in his charge to the jury stated that the question was not simply whether the deceased was under the influence of intoxicating liquors at the time, but it was whether the injury occurred in consequence of that, and it was the natural and reasonable result of his being in that condition; and he charged, in substance, that if the injury happened in consequence of his being under the influence of intoxicating liquors, the plaintiff could not recover. The court was requested to charge that, if at the time Shader was shot he was under the influence of intoxicating drinks, the plaintiff could not recover; and this was so whether the influence of the liquor occasioned the discharge of the pistol or not. This was declined. Exceptions were duly taken to the portion of the charge made and the refusal to charge.

The first inquiry which presents itself to our consideration is the construction to be placed upon the proviso referred to. An exact and accurate interpretation of the language employed manifestly conveys the idea that it was intended to comprehend all cases where injury or death might happen while the assured was under the influence of intoxicating drinks, as well as such as might occur by reason of the use thereof. As to the first class of cases stated in the pro-

¹ See also *Northwestern Life Ins. Co. v. Bank*, 122 U. S. 501; *Ætna Life Ins. Co. v. Davey*, 123 U. S. 739.

viso, the words imply that it is not required that the use of intoxicating drinks should be the moving cause in producing the injury or death, and quite sufficient to avoid a liability that the person in whose favor the policy was issued was under the influence of such stimulants, without regard to the effect which might result from such a condition. The limitation in the policy related to the *condition* of the insured, not to the *cause* which might produce his death. And here lies the distinction which is to be drawn in its construction, for, by any other or different interpretation, the words used would not only be unnecessary but meaningless and without point. As the policy was rendered void if the assured was injured or killed while under the influence of intoxicating drinks, it was not essential, to work a forfeiture, that injury or death should occur in consequence of the use of the same.

As to the second class of cases the policy was designed to provide for the possible contingency which might arise after the influence of intoxicating liquors had ceased to operate directly, and the subsequent effects produced thereby in consequence of the previous use thereof. The intention, evidently, was to limit the liability of the company by the contract with the assured, and not to incur any responsibility when the injury occurred while the assured was directly under the influence, or where the result was remotely produced by intoxicating drinks. Accidental policies are issued principally to travelers or persons exposed to unusual peril and danger, and the risk in such cases being extremely hazardous it is by no means unreasonable that the insurer should require that the assured should be under no exciting influence which may affect his self-possession or judgment, or seriously interfere with the free, full and deliberate exercise of his faculties in protecting himself from accident or harm. It follows that the proposition laid down by the judge was erroneous; and he also erred in refusing to charge as requested. * * *

¹ "I assent to the view that has been put forward by Mr. Russell, as at present advised, that "death, or injury happening while the assured is under the influence of intoxicating liquor," must in reason be read "death, or injury causing death, happening while the assured is under the influence of intoxicating liquor." The consequence would be, I think, preposterous if we held that, if the death happened while he was under the influence of intoxicating liquor the company would not be liable, whereas if the injury which caused the death happened under the same circumstances, but the man happened to be sober when he died, under those circumstances they would be liable under the proviso; and, therefore, I think the good sense of the thing is clearly with the construction which was put forward on the company's behalf. I say it is not necessary to go further for this reason, that upon the best view I can take of

9. OCCUPATION.

BLACK, J., IN HARTMAN *v.* KEYSTONE INSURANCE CO.

21 PA. 466, 477. — 1853.

IF the insured, who represented himself to be a farmer, was in fact a slave-taker by occupation, and if the business of slave-taking would expose his life to greater danger than farming, it is not possible to escape the conclusion that the policy was thereby rendered void, since, if it was wilfully made, it was a fraud; and though made ignorantly, or by mistake, it was a warranty by the express terms of the policy. The plaintiff can only recover if the declaration of the assured, upon the faith of which the risk was taken, was strictly true in every material part. It will not do to say that this was immaterial. Every fact is material which increases the risk, or which, if disclosed, would have been a fair reason for demanding a higher premium. Nor is it of any consequence that the death was not, in fact, produced by a cause connected with the subject of the misrepresentation. One who falsely declares himself free from consumption cannot effect a valid insurance on his own life, though he die of cholera. A soldier or a sailor who warrants himself a merchant, has a void policy, even though he is not slain in battle or does not perish at sea. In such cases the whole contract is entirely void, as much as if it had never been made, and of course it cannot derive any force or validity from a subsequent event.¹

the evidence that has been largely discussed before me, assuming against the company that the true construction of these words is that the intoxicating liquor must conduce to the accident, even in that view, which is the strongest view that can be taken against the company, I think that the great weight of the evidence is that in this case the man's state did conduce to the accident, and did contribute to the result which happened. Speaking merely for myself I should not construe the proviso so strongly in favor of the company. I should think, speaking only for myself, that the words "under the influence of intoxicating liquor" would be sufficiently satisfied by construing them to mean under such influence of intoxicating liquor as disturbs the balance of a man's mind. There is a point up to which any stimulating liquor, with most people at least, possibly benefits, at any rate for the time, the exercise of the intellect. There is a point beyond which it certainly impedes — disturbs it. I concede that it is very difficult even in language — certainly in the English language — to ascertain with precision where that point is; but it is enough to say that there is a point, and it seems to me these words would be satisfied when the influence of intoxicating liquor is found in point of fact to be such as to disturb the quiet and equable exercise of the intellectual faculties of the man who has taken the liquor." — Lord Coleridge, C. J., in *Muir v. Co.*, 37 L. T. N. S. 356, 357 (C. P. Div.)

¹ "If a man, for want of employment, steps aside for a season from his regular and usual calling, he does not lose his connection with or give up his craft, as

BEASLEY, C. J., IN *STONE'S ADMINISTRATORS v. UNITED STATES CASUALTY CO.*

34 N. J. L. 371. — 1871.

THE second objection, arising out of the clause of the policy above recited, was, that there was error in the charge of the judge touching that provision which prohibited a change of occupation on the part of the assured, without notice. In this policy the deceased was described as a teacher, and it was insisted that he had given up that occupation and had become a builder, which was, according to the specifications of the policy, a business attended with greater hazard. That Mr. Stone had been a teacher by profession was not denied, and the entire proof of his change of occupation since he had been insured consisted in the fact that he had caused, apparently for his own use, two dwelling-houses to be erected. There seems to be no substance whatever in this objection. The court would have been fully warranted in saying that there was no evidence whatever from which the assumption by the assured of any new business could be inferred. But the point was left to the jury, with the explanation that the expression "changing occupation," etc., meant an engaging in another employment as a usual business. It seems to require no argument to show that this exposition was correct. It is simply the clear, literal meaning of the terms, which can, in this connection, have no other signification. Mr. Stone was a teacher out of employment, and it seems preposterous to affirm that because he had one or two houses built by contract, that he thereby became a builder by profession. Persons of wealth often invest their money in buildings, but it would be a palpable error to classify them, with respect to occupation, among builders. The instructions of the judge and the findings of the jury on this head were clearly correct.¹

in this case he did not cease to be a maker of soda water because for the time being he sold it in the streets. Neither is inconsistent with the other, but both are functions of the same calling." — *Grattan v. Ins. Co.*, 80 N. Y. 281, 291. See also *Dwight v. Ins. Co.*, 103 N. Y. 341.

¹ In *North Amer. Ins. Co. v. Burroughs*, 69 Pa. 43, the assured had stated in his application that his occupation was "earthenware manufacturer." While visiting a farm he was mortally injured by an accident while loading hay. It was held that this was not a change of occupation, within the meaning of the policy. In *Johnson v. Co.*, 115 Mich. 86, one who represented himself in the application as secretary and treasurer of a grocery firm was held not necessarily to have changed his occupation to farming, by returning to his farm, which was managed by his agent, when the firm by which he was employed went out of business. In *Union Mut. Co. v. Frohard*, 134 Ill. 228, the assured whose occupation was that of merchant was accidentally killed while hunting, for recrea-

MILITARY OR NAVAL SERVICE. — In *Welts v. Ins. Co.*, 48 N. Y. 34, the life policy provided for forfeiture of the policy if the assured entered "into any military or naval service whatever." Assured was killed while in the employ, during the Civil War, of the United States Government, while he was superintendent of bridge construction upon a railroad, under the direction of, and in use by, the federal military authorities. The court said: "Entering the military service, within the meaning of the policy, must be taken in its strict or limited sense, as most advantageous to the assured, as well as all other provisions therein. The company frame the policy and choose the language. If there is anything uncertain it is the right of the assured to enjoy the most favorable rule of construction. The general understanding of the term includes such persons only as are liable to do duty in the field as combatants."

10. VIOLATION OF LAW.

MURRAY v. NEW YORK LIFE INSURANCE CO.

96 N. Y. 614. — 1884.

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made September 11, 1883, which affirmed a judgment in favor of defendant, entered upon a verdict and affirmed an order and denying a motion for a new trial. This action was brought upon two policies of insurance issued by defendant upon the life of Wisner Murray.

ANDREWS, J. — The policies upon the life of Wisner Murray, each contain a condition that if the assured "shall die in, or in consequence of a duel, or of the violation of the laws of any nation, State, or province," the policy shall be void. The assured died from a pistol shot from a pistol in the hands of one Berdell, upon whom the deceased and his brother had committed a violent assault, and the defense is based upon this condition in the policy. It is an

tion, and it was contended by defendant that the insured had, in contravention of the by-laws of the company, met his death while engaged in an "occupation more hazardous than the one in which he was engaged when insured." The court held "occupation" as found in the by-laws "to have reference to the vocation, profession, trade or calling which the assured is engaged in for hire or for profit, and not as precluding him from the performance of acts and duties which are simply incidents connected with the daily life of man in any or all occupations, or from engaging in mere acts of exercise, diversion or recreation."

undisputed fact that the brothers, acting in concert, planned the assault upon Berdell. They stationed themselves in the waiting-room of the station awaiting his arrival, and when he entered the room, Spencer Murray seized him by the arms from behind and held him, while his brother Wisner Murray, standing in front, beat him over the head and face with a raw-hide, striking from ten to twenty blows, inflicting severe and painful wounds from which the blood flowed profusely, covering his face and clothing. The assault was a brutal one, and, so far as appears, without provocation. Berdell testified that in the struggle to escape from Spencer Murray, his hand was involuntarily brought into contact with his hip pocket containing a pistol. He drew it from his pocket, and it appears that Wisner Murray, seeing the pistol, started toward the lunch counter, keeping his face toward Berdell and calling on his brother to "hold him and not to let him shoot." Wisner Murray jumped over the lunch counter, and as he was passing through a door into another room, the pistol in the hands of Berdell was discharged, the ball hitting the assured in the forehead, causing his death.

Berdell, who was called as a witness by the defendant, testified, in substance, that the firing of the pistol was accidental, and was caused by the sudden jerking of his arm by Spencer Murray, who was still holding him, and that he had no intention of firing at the deceased. It is established by the great preponderance of testimony, that until after the pistol was fired, Berdell was in the grasp of Spencer Murray, and was struggling to release himself. Berdell also testified that the deceased, during the time he was retreating, had a pistol, which he pointed at the witness as if aiming at him. He is confirmed as to the deceased having a pistol by another witness, and a pistol was found after the affray on the floor near where the deceased fell, a distance of about thirty feet from the place where Berdell was when the shot was fired. The witnesses differ as to the time which elapsed between the commencement of the affray and the firing of the pistol, the highest estimate given by any witness being thirty seconds.

It is not disputed that the assault made upon Berdell was a violation of law. But it is contended that as, according to the evidence of Berdell, the firing was accidental and not intentional, and as it also appears that it happened after the assured had abandoned the combat, his death was not "in, or in consequence of, a violation of law," and was not, therefore, a death excepted from the operation of the policy. The argument is that death under such circumstances, from an accidental shooting, cannot, in a legal sense, be attributed to the violation of law, which preceded it, so as to bring

it within the condition of the policy. There must, no doubt, be a relation between the act causing the death and the violation of law to avoid the policy. In the case of *Bradley v. Mutual Ben. L. Ins. Co.*, 45 N. Y. 422, involving the construction of a similar clause in a life policy, the court said: "It seems to be clear that a relation must exist between the violation of law and the death to make good the defense; that the death must have been caused by the violation of law."

It may be that the proviso in the policy was primarily intended to exempt the company from the hazard of a death from violence to which persons engaged in the execution of criminal acts are exposed, and especially where the unlawful or criminal act is such as is likely to be met by forcible resistance. It is plain that homicide committed in self-defense would be a death within the condition; so, also, a death at the hands of justice in punishment for crime. The death in these cases would be the direct and legitimate result of the criminal act. Another case, a little further removed from the violation of law as its cause, would be one where a party assailed, in the heat of passion, engendered by the act of the assured, on the moment takes the life of the aggressor, although the provocation might not be a legal justification of the homicide. Such a death we conceive might be within the condition, depending upon circumstances. If the violation of law in which the deceased was engaged was trivial, although calculated to some extent to excite opposition or resistance, but the taking of life was a result which no reasonable man could have contemplated as likely to follow from the unlawful act, there would be no such relation between the act and the death that the former could be said to be the cause of the latter. But if, on the other hand, the party killed was engaged in committing a violent assault, the natural result of which would be to arouse the passions and excite the anger of the party assailed, and in the heat of passion he killed his assailant, the death would, we think, be the result of the unlawful act within the meaning of the policy, although the party causing it exceeded the bounds of lawful resistance. As between the company and the assured, his violation of law ought justly to be treated as the cause of the death, because the deceased must be assumed to have known the danger he incurred, and that a party resisting an assault under such circumstances, and whose anger is naturally excited, does not mark with exactness the line which separates lawful defense from excessive and unjustifiable force.

We have, so far, had in view cases where the death of a person insured was the result of the intentional act of another, or of the

law. But while it is probable, as we have said, that cases of this kind were primarily in the contemplation of the parties to the contract, the words of the condition are too broad to permit them to be confined to this narrow and rigid limitation. The proviso clearly exempts the company from all risks of life which attend the violation of law, which are the natural and reasonable concomitants of the transaction. Prize fighting is prohibited by law, and is attended with some danger. Suppose in such a friendly contest, by mishap one of the combatants strikes a blow which causes the death of the other. Would a death under such circumstances be a death in the violation of law within the policy, although there was no intention to kill? However this might be answered, we think it is clear that there may be a death in violation of law within the meaning of the policy, although not intentionally inflicted, and although it was not occasioned by the act of another. A burglar, who in consequence of a misstep, or to escape detection, falls or jumps from the roof of a house which he is attempting to enter, and is killed, dies in violation of law as plainly as if he had been shot by the owner in defense of his dwelling. In the former as in the latter case, the death results from the criminal act, within the policy, as a natural and reasonable consequence, because, although the immediate cause of the death was the fall, yet the exposure to the danger was encountered in the prosecution of the criminal purpose. Another case may be stated, of which there may perhaps be more doubt. Suppose the assured in this case instead of having been killed by the pistol had, in the struggle with Berdell, ruptured a blood vessel, or, being predisposed to heart disease, it had been brought on by the excitement of the affray, and he had died from either of these causes in the midst of the struggle. Death from a rupture of a blood vessel, or from disease of the heart, occurring independently of any violation of law, would be covered by the policy. The company assumes the risks of death from these causes under ordinary circumstance. But do they assume such risk when the immediate, exciting cause of the death is the struggle originating in a criminal assault in which the deceased was engaged at the time? To exempt the company, must the death result from some peculiar and special risk connected with the commission of crime? It seems to us not, and that it is sufficient to bring a case within the condition, if there is such a relation between the act and the death that the latter would not have occurred at the time if the deceased had not been engaged in the violation of law.

In the case before us it is said that the shooting was accidental, and not voluntary or intentional, and consequently was not a death

in or in consequence of a violation of law. What incidents would attend the assault by the Murrays could not be foreseen. They probably did not know that Berdell had a pistol, and if they had known it, they could not have anticipated that it would be discharged in the manner stated by him. But they took the risk of his resistance to any extremity. They took the risk of any injury which might happen to them in consequence of his handling a deadly weapon, whether such injury was intentional or accidental. The case is to be considered under the actually existing circumstances of the assailants and assailed, and if the killing under these circumstances was not an unnatural result of the attack, the case is within the condition. Assuming that Berdell's statement that the shooting was unintentional was binding on the jury, and that the killing was accidental, yet the accident was the result of the struggle of Berdell to free himself from the grasp of Spencer Murray, and the jerking of his arm by the latter. The accident, so called, was caused by the assault, and the risk of injury from the discharge of the pistol was occasioned by the criminal act of the Murrays. The claim that Wisner Murray had abandoned the combat before the firing of the pistol, if true, does not meet the difficulty. He was a party to the original encounter. The struggle with Spencer Murray was continuing when the pistol was fired. If the shot had killed Spencer Murray, and he had been the person insured, there could, we think, be no doubt. It killed his brother who was unfortunately within its range, but at a time when it was said he was attempting to escape from the scene. But he was not relieved from responsibility for the act of his confederate in a crime jointly planned, who was continuing the assault, and the act of Spencer Murray in jerking the arm of Berdell, causing the explosion, is as to the company the act of both.

We are of opinion, assuming as true to its full extent the statement made by Berdell, that the defense was established. If, as there is some slight evidence to show, Berdell fired the pistol after he had escaped from Spencer Murray, the case is not changed. At all events the jury upon that theory of the case might well have found, and could not justly have found otherwise, that it was fired by Berdell in the heat of passion, and under circumstances which, if they did not fully justify him, made the firing and the consequent death a natural and reasonable consequence of the assault. Whether, therefore, the firing of the pistol was intentional or not, or whether Wisner Murray had or had not abandoned the combat, the jury upon the evidence were justified in finding, as they did by the general verdict, that the assured died in, or in consequence of, a violation of law. This

conclusion answers the points made upon the exceptions to the charge. * * *

We think the judgment should be affirmed

All concur, except DANFORTH, J., absent.

Judgment affirmed.¹

¹ In *Goetzman v. Co.*, 3 Hun, 515, the proof in the case tended to show that just after having committed adultery with Mrs. Hesler, the assured was shot and killed by her husband. The court said: "The condition of the policy is, that 'if the assured shall die by suicide, or in consequence of his violation of any law,' the policy shall be void. Assuming that the act of adultery was a violation of law, within the meaning of the parties to the contract of insurance, we are of opinion that the assured did not die in consequence of it. The undisputed facts show that he was killed, not in the act of adultery, nor in defense of person or property. The offense had been completed, and the assured was about to go away. He was not, therefore, at the time he was killed, violating any law, or even committing a trespass, for he was in the house by the license of the wife, from whom the husband had separated." In *Griffin v. Assoc.*, 20 Neb. 620, assured had wrongfully obtained money from the state treasury. The attempt having been expected a policeman was stationed to intercept him when escaping and assured refusing to stop the policeman shot him. The court said: "It will be observed that the condition named is, 'if a member shall die while violating any law,' etc. That is, in the actual violation of a law. Now suppose Griffin had robbed the state treasury, and had left it, and was about to emerge from the building when he was killed, can it be said that at the time of his death he was violating any law of the state? We think not. Suppose that instead of robbing the treasury he had made an assault upon the treasurer in his office, or committed a battery upon him and had left the treasury department and nearly reached the outer door of the capitol when he was killed, it will not be contended that at the time of his death he was violating the law. So in this case the act of Griffin in obtaining money from the treasury had been completed and he was then endeavoring to make his escape. Griffin therefore was not killed while violating the law, and there is no forfeiture of the certificate on that ground."

In *Cornwell v. Assoc.*, 6 N. D. 201, where the insured having started out in the prohibited season to kill prairie chickens accidentally shot himself while scaling a bank, it was held that the insured "was not engaged in the killing of anything at the time the accident occurred" and recovery was allowed. But in *Duran v. Co.*, 63 Vt. 437, the insured slipped and injured his knee while walking home from hunting on Sunday, and he was not allowed to recover from the company. Both traveling on Sunday and hunting on Sunday were prohibited by statute, but in this case the provision of the policy was that there should be no recovery if the violation of law were the act, cause, or condition of the injury or where the injury "was effected by any such act, cause or condition."

See also *Gresham v. Co.*, 87 Ga. 497 (assault and battery); *Bloom v. Co.*, 97 Ind. 478 (assault and battery).

SUICIDE AS A VIOLATION OF LAW.—"The provision relied upon to support the defense so alleged, is the provision in the contract that it should "be void if

ELLIOTT, C. J., IN *BLOOM v. FRANKLIN LIFE INS. CO.*

97 IND. 478, 481, 482. — 1884.

GRANTING it to be true, as decided in *Cluff v. Mutual, etc., Insurance Co.*, 13 Allen, 308, that the violation of law must, in order to avoid the policy, be a breach of some criminal statute, still the answer is good, for courts judicially know that an assault and

the member herein shall die * * * in violation of or attempt to violate any criminal law of the United States, or of any state or country in which the member herein named may be." The death of Darrow was in this state. At common law suicide was a crime, and the consequence was the forfeiture of the chattels, real and personal, of the *felo de se*. (4 Bl. Com. 190.) It is not a crime in this state. (Penal Code, §§ 2, 173.) The attempt to commit suicide is made a crime by the statute. * * * (Id., § 178.) While the attempt to commit suicide is a crime, the accomplishment of the purpose to do so is not. * * * It must, for the purpose of the question here, be assumed that Darrow had the purpose of taking his own life, and that he fully accomplished such purpose. The result of his act influenced by such intent, then, was his death. By the act of taking his own life he violated no criminal law, unless the attempt to do it may be distinguished from the act accomplished. An act is characterized by the purpose, when ascertained, of the party doing it, or by its result. If the act fails to accomplish its purpose, it constitutes an attempt, but if the result of it is the consummation of the purpose, the act is not commonly designated as an attempt." — *Darrow v. Soc.*, 116 N. Y. 537.

"We now come to consider the effect of the clause providing that death 'in consequence of, or in violation of law' is not a risk covered by the policy. It is truly said that intentional suicide while sane was a felony at common law. It was punished by forfeiture of goods, but, as we do not inflict such punishments, it is now little more than the shadow of a crime. Technically, it is still a crime in this state, because we have retained the common law so far as it is not inconsistent with our laws and general situation, but it is not a crime within the ordinary meaning of the term, or any usual definition, because we have no statute punishing either suicide or attempted suicide." — *Patterson v. Co.*, 100 Wis. 118.

DEATH AT THE HANDS OF JUSTICE.—"The question is whether, * * * the party effecting the insurance having committed felony, and having been tried, convicted, and executed for felony — the parties representing him, and claiming under him and in his right, can maintain the suit. * * * Suppose that in the policy this risk had been insured in terms — that in the event of the party effecting the insurance being executed for a capital felony, the money should become payable — is it possible that a claim in right of a party effecting such an insurance could be maintained, or that the insurance should not be held void as affording encouragement to crime, and being contrary to public policy? If such a policy could not be sustained where a risk of that kind was mentioned in direct terms and language, how can you give effect to a policy if it in reality involves that condition? On this short and plain ground, we are of opinion that the claim cannot be sustained." — *Amicable Soc. v. Bolland*, 2 Dow. & Clark, 1.

battery is an offense punishable as a crime. * * * The soundness of the decision in *Cluff v. Mutual, etc., Ins. Co., supra*, upon the point immediately under discussion, is questioned in the well-considered case of *Bradley v. Mutual, etc., Ins. Co.*, 45 N. Y. 422, and was denied in the same case by the Supreme Court of New York. It does seem a wide stretch of judicial power to affirm that a clause reading, "Or in case he shall die by his own hand, or in consequence of a duel, or by reason of intemperance from the use of intoxicating liquors, or by the hands of justice, or in the known violation of any law of these States, or of the United States, or of the said provinces, or of any other country which he may be permitted under this policy to visit or reside in, this policy shall be void," refers solely to criminal laws. If the words employed are taken in their usual signification, it would seem quite clear that death in the known violation of any law, criminal or civil, would make the policy inoperative. An illustration was put by Grover, J., in *Bradley v. Mutual Ins. Co., supra*, which goes far to show the unsoundness of the decision in *Cluff v. Mutual, etc., Ins. Co., supra*: "Again, suppose the death occurred from injury received while the assured was attempting to obtain by force the possession of a chattel of which another was in peaceable possession, the title to which was claimed by both, but which was really in the assured, the case would come within the proviso, for the reason that the risk was increased, and the death caused by the violation of law by the assured, although such law was the civil only, the deceased having committed no breach of the peace or any indictable offense." Suppose, as a further illustration, that the law prohibits a passenger from standing on the platform of a railway car while in motion, or that it prohibits persons from approaching within a specified distance of a blast about to be fired, would not a known violation of such a law increase the risk, and be within the letter and the spirit of the provision in the policy? On the other hand, it is not every violation of law which should absolve the company even though the law be a criminal one. Suppose a man violates our law against profanity, and is shot while doing it, should that absolve the company from liability? Again, suppose a man violates our Sunday law by fishing, and while committing the offense is shot and killed, would that relieve the company? In a late case, *Hatch v. Mutual Life Ins. Co.*, 120 Mass. 550 (21 Am. R. 541), a rule was declared which it seems difficult, if not impossible, to reconcile with that laid down in *Cluff v. Mutual, etc., Co., supra*, for it was held in the later case that where an assured submits to a surgical operation for the purpose of producing abortion there can be no recovery upon the policy. It is true that the

opinion puts the decision upon the ground of public policy, but when the real reason for the decision is reached, it will be found that it rests upon the ground that the act was in violation of the rights of the insurance company, for an act against public policy cannot relieve the company unless it is one increasing the risk. If a man should violate public policy by entering into an illegal conspiracy to prevent competition at a public sale, and this should lead to his death, we suppose no one would claim that because his act was against public policy the insurance contract was avoided. Again, if an assured should enter into a conspiracy to corruptly control the acts of a government official, or should enter into a marriage brokerage contract, and these acts should lead to his death, it would be clear that the policy of insurance would not be rendered void. In our opinion the law is this: A known violation of a positive law, whether the law is a civil or a criminal one, avoids the policy if the natural and reasonable consequences of the violation are to increase the risk; a violation of law, whether the law is a civil or a criminal one, does not avoid the policy if the natural and reasonable consequence of the act does not increase the risk.¹

¹ "The first step in the inquiry is the construction of this proviso. The exact interpretation to be given to the words 'in case he shall die * * * in the known violation of any law of these States,' etc., has been the subject of serious debate. In another action upon a like policy of the same company on the life of the same party, which was tried four times in the State of Massachusetts, the Supreme Court of that State, in a carefully considered opinion, held that the proviso must be construed to refer to a voluntary criminal act on the part of the insured, known by him at the time to be a crime against the law of the State, and not to mere trespasses against property or infringements of civil laws to which no criminal consequences are attached. *Cluff v. Mutual Ben. L. Ins. Co.*, 13 Allen, 308, 316, 317; s. c., 99 Mass. 318. This conclusion is based by that learned court upon the natural import of the words 'known violation of law,' and upon their being found immediately following the words 'by the hands of justice.' A similar construction was adopted by the Supreme Court of Missouri, in the cases of *Harper's Administrators v. The Phoenix Ins. Co.*, 19 Mo. 500, and 39 Mo. 122; and the case of *Breasted v. The Farmers' L. & T. Co.*, 4 Seld. 299, has some bearing in the same direction. The Supreme Court of this State, [3 Lans. 341], whose decision is now under review, do not agree to the interpretation given to the proviso by the courts of Massachusetts and Missouri, and a difference of opinion exists between the members of this court as to whether the proviso applies only to violations of the criminal law, or whether it embraces all illegal acts of such a character as to lead to violence." — *Bradley v. Co.*, 45 N. Y. 422, 427. "A contract to insure a woman against the risk of her dying under or in consequence of an illegal operation for abortion would be contrary to public policy and could not be enforced in the courts of this commonwealth." — *Hatch v. Co.*, 120 Mass. 550.

11. TOTAL DISABILITY.

SAVELAND *v.* FIDELITY AND CASUALTY CO.

67 Wis. 174. — 1886.

PLAINTIFF, by occupation a merchant grocer in Milwaukee, in consideration of \$15 by him paid, procured of the defendant a policy of insurance, wherein the defendant, among other things, agreed in effect that "if the insured shall sustain bodily injuries, * * * effected through external, violent, and accidental means, which shall, independently of all other causes, immediately *and wholly* disable and prevent him from the prosecution of *any and every* kind of business pertaining to his occupation, then, on satisfactory proof of such injuries, he shall be indemnified against loss of time thereby in a sum not exceeding \$15 per week for such period of *continuous total disability* as shall immediately follow the accident and injuries aforesaid, not exceeding, however, twenty-six consecutive weeks from the time of the happening of such accident." Plaintiff was accidentally hit with great force upon his instep by a stick of wood thrown by some party, inflicting an outward and external mark, breaking through the flesh, and seriously injuring his foot, by reason of which he "was wholly disabled" and "unable to engage in any business" for the first week thereafter, and was, during that time, "confined to his home and under the doctor's charge;" "that afterwards, by means of great exertion, he was enabled to get to his buggy, and superintend a small part of his business, but was almost wholly disabled for the whole period of twenty-six weeks." The answer alleged, in effect, that the proofs of loss from the accident, furnished by the plaintiff, stated a "total disability therefrom for four days, and no more." Under the charge of the court, the jury returned a verdict "for the plaintiff in the sum of \$135, for nine weeks, at \$15 per week." Defendant appeals.

CASODAY, J. — The cause was submitted to the jury on the theory that it was the object of the policy to insure the plaintiff against accident, and to pay the plaintiff what the company had agreed to pay for the accident he had received, if by that accident he had been disabled in any way from prosecuting the business in which he was engaged; that it was to indemnify the plaintiff "for his want of capacity to prosecute the business in which he was engaged;" that the plaintiff was "entitled to recover, at the rate agreed on in the policy, for such time as by reason of such accident he" was "rendered wholly unable to do his accustomed labor; that is, to do substantially *all kinds* of his accustomed labor to some extent." The

learned trial judge was supported in such theory by the language of the court in *Sawyer v. U. S. Casualty Co.*, 8 Am. Law Reg. (N. S.) 233. The clause of the policy there involved was, "totally disable him from the prosecution of his usual employment." The case was in the Superior Court of Worcester, Massachusetts, but never reached the Supreme Court of that State, nor do we find it referred to in any subsequent case in any court. That case apparently followed *Hooper v. Accidental D. Ins. Co.*, 5 Hurl. & N. 546, where the clause of the policy relied upon was, "any bodily injury to the said insured of so serious a nature as wholly to disable him from following his usual business, occupation, or pursuits;" and it was held, in effect, that a disability which incapacitated the assured from "following his usual occupation, business or pursuits" was a breach. In neither of those cases was the language of the policy so broad and sweeping as in the case at bar. The language of this policy is even more sweeping than in *Rhodes v. Railway Pass. Ins. Co.*, 5 Lans. 77, where it was held that there could be no recovery because it was not shown that there was a "total disability to labor." In that case the language of the policy was, "accident and injury which totally disabled and prevented from all kinds of business." The same is true with respect to *Lyon v. Railway Pass. Assur. Co.*, 46 Iowa, 631, where the language of the policy was, "while totally disabled and prevented from the transaction of all kinds of business;" and it was held that such language could not be construed to mean "partially disabled from some kinds of business."

Here the plaintiff was only entitled to recover in case the injury was such as to "wholly disable and prevent him from the prosecution of any and every kind of business pertaining to his occupation," and then only "for such period of continuous total disability," not exceeding the amount stipulated, nor "the money value of his time during the period of continuous total disability, not exceeding twenty-six weeks." The ordinary object of a policy of insurance may be such as stated by the learned trial judge, but the manifest purpose of this policy was to obtain premiums by incurring as little risk as possible. But there was no law to prevent the parties from making their own contract. The plaintiff consented to and made this one. He cannot repudiate or alter its conditions in the day of his calamity. The courts are powerless to make a new contract for him or to strike some words from the contract he made for himself, and insert others, and thus enlarge the risk, in order to meet the expectation of the plaintiff in obtaining the policy. This we should be compelled to do in order to sanction the charge to the jury. The plaintiff's right to recover is necessarily restricted to the time he

was wholly disabled and prevented "from the prosecution of any and every kind of business pertaining to his occupation."

By THE COURT. — The judgment of the County Court is reversed, and the cause is remanded for a new trial.

YOUNG *v.* TRAVELERS' INSURANCE CO.

80 ME. 244. — 1888.

LIBBEY, J. — The plaintiff seeks to recover on an accident insurance policy issued to him by the defendant corporation. The main questions involved are: 1. Whether the plaintiff by the accident to him was wholly disabled and prevented from the prosecution of any and every kind of business pertaining to the occupation under which he was insured. * * *

The language of the policy upon which the first question arises is as follows: If the insured, "at any time within the continuance of this policy, shall have sustained bodily injuries, effected through external, violent, and accidental means, within the intent and meaning of this contract and the conditions hereunto annexed and such injuries alone shall have occasioned death within ninety days from the happening thereof; or, if the insured shall sustain bodily injuries, by means as aforesaid, which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured, then, on satisfactory proof of such injuries, he shall be indemnified against loss of time thereby, in a sum not exceeding twenty-five dollars per week, for such period of continuous total disability as shall immediately follow the accident and injuries as aforesaid not exceeding, however, twenty-six consecutive weeks from the time of the happening of such accident."

The occupation under which the plaintiff was insured was that of a billiard saloon keeper. The contention between the parties is, whether to maintain his action it is incumbent upon the plaintiff to prove that the injuries he sustained by the accident wholly disabled him from the doing of any and every kind of act necessary to be done in the prosecution of his business, or it is sufficient if he proves that the injury received from the accident wholly disabled him from the doing of all substantial and material acts necessary to be done in the prosecution of his business. The plaintiff admitted that he could do some acts necessary to be done in the business of a billiard saloon keeper, but claimed and introduced evidence tending to

prove that he was wholly disabled from doing many of the material acts necessary to be done in that business. Upon this point the presiding justice instructed the jury as follows: "Now the reasonable construction which must be put upon the language here used is, that it must have meant that if the plaintiff was so disabled as to be incapable of doing any and every kind of business pertaining to his occupation as a billiard saloon keeper, then he would be wholly disabled from the prosecution of every kind of business pertaining to such occupation and entitled to the stipulated compensation. Otherwise, if he was not so disabled he would not be entitled; and therefore, gentlemen, I instruct you as matter of law that the meaning of the language here used is, not that he must be so disabled as to prevent him from doing anything whatsoever pertaining to his occupation, or any part of his business pertaining to his occupation as billiard saloon keeper; but that he must be so disabled as to prevent him from doing any and every kind of business pertaining to his occupation. There may be a difference between being able to perform any part of his business and any and every kind of business pertaining to his occupation."

We think that there is no error in this instruction. A contract of insurance is to receive a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt it is to be liberally construed in favor of the insured that in all proper cases he may receive the indemnity contracted for. At the same time legal effect should be given to all the language used, for the purpose of guarding the company against fraud and imposture. The object to be accomplished by this contract was indemnity to the plaintiff for loss of time from being wholly disabled from prosecuting his business by an injury received as specified in the policy. He was not able to prosecute his business unless he was able to do all the substantial acts necessary to be done in its prosecution. If the prosecution of the business required him to do several acts and perform several kinds of labor, and he was able to do and perform one only, he was as effectually disabled from performing his business as if he could do nothing required to be done, and while remaining in that condition he would suffer loss of time in the business of his occupation. Suppose a barber, who can use his razor and shears in his right hand only, but can use his left to wipe his customer's face, comb and dress his hair and receive pay and make change, by an accident is wholly deprived of the use of his right hand so that he can neither shave his customer nor cut his hair; can it be said that he is not wholly disabled from the prosecution of his business as a barber? An accident policy which would not afford indemnity in

such a case would be a delusion and a snare. This construction is sustained by *May on Insurance*, § 522. *Hooper v. Accidental Death Ins. Co.*, 5 H. & N. 545. Affirmed in Exch. Ch. 6 H. & N. 839.

We think the presiding justice might have gone farther in the construction of this clause of the policy, and instructed the jury that to entitle the plaintiff to recover he was not required to prove that his injury disabled him to such an extent that he had no physical ability to do what was necessary to be done in the prosecution of his business, but that it was sufficient if he satisfied them that his injury was of such a character and to such an extent that common care and prudence required him to desist from his labors and rest so long as it was reasonably necessary to effectuate a speedy cure — so that a competent and skillful physician called to treat him would direct him so to do. It is the duty of the insured towards the insurer to use all due care and pursue the proper course to effect a cure so that the loss of time for which he is to receive indemnity may be no greater than is reasonably necessary. * * *

Exceptions and motion overruled.

PETERS, C. J., WALTON, DANFORTH, EMERY, and HASKELL, JJ., concurred.

12. WHEN LIABILITY FIXED.

COOPER v. UNITED STATES MUT. BENEFIT ASSOC.

132 N. Y. 334. — 1892.

HAIGHT, J. — This action was brought upon a certificate of insurance, issued by the defendant, to recover five thousand dollars. The defendant, by its certificate, undertook to insure Theodore H. Cooper against personal bodily injury, and in case he should receive such injuries disabling him from transacting business pertaining to his occupation to pay him certain amounts specifically named in the certificate, dependent upon the nature of his injuries, and in case death should result from such injuries within ninety days to pay to the plaintiff, as his wife, the sum of five thousand dollars. The certificate contained the following: "No suit or proceeding at law or in equity shall be brought * * * to recover any sum under this insurance unless the same is commenced within one year from the time of the alleged accidental injury."

Cooper received an accidental bodily injury on December 10, 1887, which resulted in his death on January 2, 1888. This action was

¹ See also *Thayer v. Co.*, 68 N. H. 577.

commenced on December 29, 1888, more than one year after the accident, but within one year of his death. It is claimed that the action was not commenced within the time required by the provision of the certificate referred to. It will be observed that provisions are made in the certificate for two different persons who, upon the happening of the events specified, may have a right of action against the association. One provision is in favor of Cooper, who may recover during his lifetime the amounts provided for his disability resulting from the accidental injury received. The other is to his wife, which is for the injuries she suffers by reason of his death resulting from such accident. The accident received by Cooper did not injure the plaintiff or give her a right of action until death ensued. So far as she is concerned the infliction of the wound is but the beginning, and the death is the completion of the injury. Her suit must be "commenced within one year from the time of the alleged accidental injury." In other words, within one year from the time of the injury to her, which was the death of her husband, as the result of the accident. * * *¹

13. BURDEN OF PROOF.

TRAVELLERS' INSURANCE CO. *v.* MCCONKEY.

127 U. S. 661. — 1888.

MR. JUSTICE HARLAN. — There is no escape from the conclusion that, under the issue presented by the general denial in the answer, it was incumbent upon the plaintiff to show, from all the evidence, that the death of the insured was the result, not only of external and violent, but of accidental means. The policy provides that the insurance shall not extend to any case or death or personal injury, unless the claimant under the policy establishes, by direct and positive proof, that such death or personal injury was caused by external violence *and* accidental means. Such being the contract, the court must give effect to its provisions according to the fair meaning of the words used, leaning, however — where the words do not clearly indicate the intention of the parties — to that interpre-

¹ In *Burkheiser v. Assoc.*, 61 Fed. 816, the certificate provided for payment for accidental death, if the death occurred within ninety days from the time of the accident. After the accident and before death the insured ceased to be a member of the association by reason of failure to pay an assessment falling due after the accident. Plaintiff was allowed to recover, since defendant's liability became fixed at the time of the accident.

tation which is most favorable to the insured. *National Bank v. Ins. Co.*, 95 U. S. 673; *Western Ins. Co. v. Cropper*, 32 Penn. St. 351, 355; *Reynolds v. Commerce Fire Ins. Co.*, 47 N. Y. 597, 604; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484, 498, 507; *Fowkes v. Manchester, etc., Life Assurance Ass'n*, 3 B. & S. 917, 925.

The requirement, however, of direct and positive proof, as to certain matters, did not make it necessary to establish the fact and attendant circumstances of death, by persons who were actually present when the insured received the injuries which caused his death. The two principal facts to be established were external violence and accidental means, producing death. The first was established when it appeared that death ensued from a pistol shot through the heart of the insured. The evidence on that point was direct and positive; as much so, within the meaning of the policy, as if it had come from one who saw the pistol fired; and the proof, on this point, is none the less direct and positive, because supplemented or strengthened by evidence of a circumstantial character.

Were the means by which the insured came to his death also accidental? If he committed suicide, then the law was for the company, because the policy by its terms did not extend to or cover self-destruction, whether the insured was at the time sane or insane. In respect to the issue as to suicide, the court instructed the jury that self-destruction was not to be presumed. In *Mallory v. Travellers' Ins. Co.*, 47 N. Y. 52, 54, which was a suit upon an accident policy, it appeared that the death was caused either by accidental injury or by the suicidal act of the deceased. "But," the court properly said, "the presumption is against the latter. It is contrary to the general conduct of mankind; it shows gross moral turpitude in a sane person." Did the court err in saying to the jury that, upon the issue as to suicide, the law was for the plaintiff, unless that presumption was overcome by competent evidence? This question must be answered in the negative. The condition that direct and positive proof must be made of death having been caused by external, violent, and accidental means, did not deprive the plaintiff, when making such proof, of the benefit of the rules of law established for the guidance of courts and juries in the investigation and determination of facts.

Upon like grounds, we sustain the ruling to the effect that the jury should not presume, from the mere fact of death, that the insured was murdered. The facts were all before the jury as to the movements of the insured on the evening of his death, and as to the condition of his body and clothes when he was found dead, at a late hour of the night, upon the floor of his office. While it was not to

be presumed, as a matter of law, that the deceased took his own life, or that he was murdered, the jury were at liberty to draw such inferences in respect to the cause of death as, under the settled rules of evidence, the facts and circumstances justified.

We are, however, of opinion that the instructions to the jury were radically wrong in one particular. The policy expressly provides that no claim shall be made under it where the death of the insured was caused by "*intentional injuries, inflicted by the insured or any other person.*" If he was murdered, then his death was caused by intentional injuries inflicted by another person. Nevertheless, the instructions to the jury were so worded as to convey the idea that if the insured was murdered, the plaintiff was entitled to recover; in other words, even if death was caused wholly by intentional injuries inflicted upon the insured by another person, the means used were "accidental" as to him, and, therefore, the company was liable. This was error.

Upon the whole case, the court is of opinion that, by the terms of the contract, the burden of proof was upon the plaintiff, under the limitations we have stated, to show, from all the evidence, that the death of the insured was caused by external violence and accidental means; also, that no valid claim can be made under the policy, if the insured, either intentionally or when insane, inflicted upon himself the injuries which caused his death, or if his death was caused by intentional injuries inflicted upon him by some other person.

The judgment is accordingly reversed, and the cause remanded, with directions to grant a new trial and for further proceedings consistent with this opinion.¹

¹ "Death through external, violent, and accidental means having been proved the burden of proof was on the defendant to show a voluntary exposure to unnecessary danger, or a want of due diligence. *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572; *Badenfeld v. Massachusetts Accident Association*, 154 Mass. 77. The question is not the same as would arise in an action against the railroad company to recover damages for the accident which caused the death. In such action, the relation of the deceased to the railroad company would probably be that of a bare licensee, to whom the railroad company owed no duty except to abstain from reckless and wanton conduct. *Redigan v. Boston & Maine Railroad*, 155 Mass. 44, and cases there cited. Moreover, there may have been such a want of positive care on his part with reference to approaching cars as would prevent a recovery, the burden being upon the plaintiff in such action to prove due care affirmatively. In the present action the burden of the proof is different, and the questions of due diligence and of voluntary exposure to unnecessary danger arise, not upon general principles of the law of negligence, but upon the construction of the contract of insurance against accidents. Clearly a contract of indemnity against accidents should be construed with

VI. TERMS OF THE MUTUAL BENEFIT INSURANCE CONTRACT.

1. IN GENERAL.

COMMONWEALTH *v.* WETHERBEE.

105 MASS. 149. — 1870.

[*Reported herein at p. 13.*]

IN THE MATTER OF THE GLOBE MUTUAL BENEFIT ASSOCIATION.

135 N. Y. 280. — 1892.

[*Reported herein at p. 28.*]

2. WHERE THE TERMS ARE TO BE FOUND.

EASTMAN *v.* PROVIDENT MUTUAL RELIEF ASSOC.

62 N. H. 555. — 1883.

ASSUMPSIT, by the administrator of the estate of George H. Gigar, to recover \$2,000 insurance on the life of the deceased. The defendants are a corporation chartered "for charitable and benevolent purposes, and furnishing relief and assistance by means of mutual agreements and payments of funds," and are authorized "to establish all by-laws and regulations which may be necessary to carry out the purposes of this act." One of the by-laws reads as follows: "When a member dies the association shall pay, within sixty days, to his direction, as entered upon his certificate of membership, the sum of two thousand dollars. * * *" The deceased was a member of the Subordinate Association, No. 10, located at Tilton. He paid all fees, dues, and assessments to the time of his death, and was otherwise in good standing. He left many creditors, but no father, mother, brother, sister, nor, so far as known, any other relative. He held a membership certificate in common form, which, after reciting his admission, provided this: "In accordance with the provisions and laws governing said association, a sum not exceeding \$2,000 will be paid by the association as a benefit, upon

more liberality to the assured than the rules of common law, if the same person seeks under them to put the responsibility for his accident upon another." — *Keene v. Assoc.*, 161 Mass. 149 150. See also *Anthony v. Assoc.*, 162 Mass. 354.

due notice of his death and the surrender of this certificate, to such person or persons as he may, by entry on the record-book of the association, or on the face of this certificate, direct said sum to be paid, providing he is in good standing when he dies." No person's name was entered on the record-book of the association or on the certificate, showing to whom the benefit should be paid. No question is made as to the proper notices of his death, nor that all proper demands and proofs have not been made according to the by-laws. No part of the benefit has been paid to the administrator or to any other person.

At the trial the defendants offered to show that the deceased had, for two years prior to his death, been engaged to be married to A. G. S.; that he said at the time of making his application for membership, that he designed the benefit ultimately to be made payable to her, and that he afterwards frequently told her and others that he intended the benefit to be payable to her in case of his death, and this was repeated to her a short time before his death. The evidence was excluded, and the defendant excepted. The plaintiff offered to show, by parol evidence, that the deceased omitted to insert any name as a beneficiary, with the intention of making the benefit of \$2,000 payable to his administrator for the benefit of his estate. The evidence was excluded and the plaintiff excepted. The court found the plaintiff entitled to recover, and the defendants excepted.

SMITH J. — The defendants are a corporation organized for charitable and benevolent purposes. These purposes, as described in their charter, are the "furnishing relief and assistance by means of mutual agreements and payments of funds." Their object is more particularly defined in their by-laws to be "to secure to dependent and loved ones assistance and relief at the death of a member." They resort to assessments for the procurement of the funds to discharge their mutual obligations, and are governed by by-laws which limit and define those obligations. Such associations for the general purpose of mutual protection resemble life insurance companies, and are life insurance companies in substance. May Ins. (2d ed.), § 550; *Dennett v. Kirk*, 59 N. H. 10; *Smith v. Bullard*, 61 N. H. 381; *Commonwealth v. Wetherbee*, 105 Mass. 149; *State v. Society*, 72 Mo. 146. But a beneficiary certificate differs considerably in its nature from the ordinary life insurance policy. The latter is generally regarded as a debt payable by the company to the estate of the insured, and collectible at all events from the company by the legal representatives of the insured, or by parties named in the policy. Hirschl Law of Fraternities, § 8.

The defendants' contract bound them to pay a sum not exceeding \$2,000, as a benefit, upon due notice of the death of the plaintiff's intestate and the surrender of his certificate of membership, to such person or persons as he might, by entry on the record-book of the association or on the face of his certificate, direct the sum to be paid. Does the neglect of the holder of the certificate to designate a beneficiary in the manner specified absolve the association from the payment of the benefit? The charter, by-laws, and certificate of membership taken together show what was the understanding of the parties. It was no part of the object of the association to provide a fund for the payment of a deceased member's debts, however meritorious such purpose might be; nor, as in this case, where there are no heirs, and the claims of creditors are less than the amount of the benefit, that the benefit should escheat to the estate. The designation in the certificate of one class — such person or persons as Gigar should appoint — excludes the other classes — heirs, creditors, etc. The certificate was neither payable to the deceased, nor to his administrator, assigns, heirs, estate, or legal representatives. The defendants promised to pay the benefit to no one save such person or persons as Gigar should direct by entry upon the certificate or record-book. By the contract he had the mere power of appointing the person who should receive the benefit. He was bound by the rules of the association, and could not change the beneficiary in a way not in conformity with them. *Kentucky Masonic Mut. Ins. Co. v. Miller's Adm'r*, 13 Bush, 494. Why he did not exercise his power of appointment it is unnecessary to inquire. He may not have decided in his mind who should receive it. He may have intended that his associate members should not be called upon to contribute the sums required to fulfil his contract with the association. The presumption is, that he intended not to do what he omitted to do. *Worley v. Association*, 3 M'Crary, 53, s. c., 10 Fed. Rep. 227. He had no pecuniary interest in his membership, and his personal representatives, as such, can take no interest in it after his death. The benefit is not assets, for if the administrator can collect the money, it must go primarily to Gigar's creditors. The charter, by-laws, and certificate show that neither party had any such understanding. If he had exercised the power of appointment, his administrator could not maintain a suit to recover the money; and his neglect to exercise it does not give the administrator the power. There being no contract to pay to the deceased or to his legal representative, there is no breach. In *Worley v. Association*, *supra*, upon a similar state of facts, it was held that the administrator of the assured could not recover. *McClure v. John-*

son, 56 Iowa, 620, decides that where a life policy by its terms is payable to a person other than the assured or his representatives, the payee cannot by will make a different disposition of the fund from that directed by the policy. A mere power of appointment, which is not exercised prior to the death of the beneficiary in the manner specified, becomes inoperative, and the company or association is not bound to pay it to any one. *Maryland Mut. Benev. Soc. v. Clendinen*, 44 Md. 429.

The evidence offered as to Gigar's intention as to whom the money should be made payable was inadmissible to vary the construction of the certificate, and was insufficient to constitute a trust. *Wason v. Colburn*, 99 Mass. 342.

Case discharged.

ALLEN and CLARK, JJ., did not sit; the others concurred.¹

3. CHANGE OF TERMS.

PELLAZZINO *v.* GERMAN CATHOLIC ST. JOSEPH'S SOC.

16 WEEKLY LAW BULLETIN AND OHIO LAW JOUR. 27. — 1886.

(*Sp. Term, Cincinnati Superior Ct.*)

HARMON, J. — Defendant is a mutual benevolent society of which plaintiff's ward, her husband, Joseph Pellazzino, had been for sixteen years, and when this action was brought was a member in good standing. By one of the by-laws, sick members were entitled to receive three dollars per week, while unable to pursue their usual business, and by another such benefits were guaranteed to sick members, though in public charitable institutions. In October, 1881, Pellazzino became insane, and in April, 1882, was sent to Longview Asylum. He escaped in July, and remained at home until October, when he was returned to the asylum, where he still remains. * * * By the original by-laws of the defendant the usual right to amend them was reserved; and on October 31, 1882, after due presentation and notice, an amendment was duly adopted limiting said benefits to sick members to thirteen weeks in each year. The only question in the case is whether the rights of Pellazzino to benefits during his then existing inability were affected by this amendment, he not having been present at or agreed to its adoption.

¹ Accord as to failure of designation of beneficiary. *Hellenberg v. Dist. No. One*, 94 N. Y. 580.

"It is true the membership certificate bears upon its face no promise of indemnity, but it entitles the holder to membership in the association and to

That members whose rights to benefits have become fixed by illness are liable to have them lessened or taken away entirely by such amendments was decided in *Fugate v. Mut. Society of St. Joseph*, 46 Vt. 362; but the court's reasoning and conclusion are so wide a departure from the common principles of our system of law and of natural justice that I should hesitate to follow them if that case were the only authority on the subject. I certainly am not willing to do so after reading *Poultney v. Bachmann*, 62 How. Pr. 466; *Gundlach v. Ger. Mech. Ass'n*, 4 Hun, 339, and Herschl on the Law of Fraternities, etc., p. 61.

It is true, as argued by counsel for defendant and held by the court in Vermont, that by the terms of the agreement between the members which constitutes the society, and of that between the society and each member which amounts to a policy of insurance, a right to amend was reserved. But it was a right to amend the by-laws, not to repudiate a debt. A by-law provides what the rights of members shall be in certain events if they continue to pay their dues until such events happen; this, of course, by virtue of the reserved right, may be amended or repealed. But when the event happens, what was a contract depending on a contingency becomes in law a debt. The right to modify a contract does not include the right to repudiate a debt any more than the reserved right of a legislature to repeal the charter of a corporation gives it the right to confiscate its property. The rights of Pellazzino as a member, including his contingent right to benefits, were subject to modification, whether he consented at the time or not; his rights as a creditor when by falling ill he became one, this contingent right so becoming fixed, are not made so by the language of the contract between him and defendant, and therefore cannot be surrendered except by his consent. This dual character of a member who has fallen ill, which is analogous to that of a borrowing member of a building association, was, we think, overlooked by the learned court in Vermont and the learned counsel in Cincinnati.

Judgment for plaintiff.¹

all rights that appertain thereto, and it is to be construed, in connection with the constitution and by-laws, the same as though all of those documents were combined in one." *Railway Cond. Ben. Assoc. v. Robinson*, 147 Ill. 138, 152. In *Hellenberg v. Dist. No. One*, 94 N. Y. 580, there was apparently no provision for issuing a certificate, and the court said: "The charter and by-laws of the defendant corporation constituted the terms of an executory contract to which the testator assented when he accepted admission into the order." — See also *Schunck v. Fond*, 44 Wis. 369; *Worley v. Assoc.*, 10 Fed. 227

¹ "Subsequent or existing by-laws are valid only when consistent with the charter, and confined to the nature and objects of the association. While a

VII. TERMS OF FIDELITY AND GUARANTY INSURANCE CONTRACTS.

1. IN GENERAL.

PEOPLE *v.* ROSE.

174 ILL. 310. — 1898.

[*Reported herein at p. 16.*]

2. FIDELITY INSURANCE.

FIDELITY AND CASUALTY CO., OF NEW YORK *v.* EICKHOFF.

63 MINN. 170. — 1895.

APPEAL from an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

MITCHELL, J. — The plaintiff, a foreign corporation, is what is termed a "guaranty insurance company," engaged in the business of guarantying to employers the fidelity of their employees. This action was brought to recover money alleged to have been paid to the Red River Elevator Company, defendant's employer, upon a bond by which the plaintiff obligated itself to make good, and reimburse to the elevator company, such pecuniary loss as it might sustain by reason of the infidelity of the defendant as its receiving agent in one of its grain elevators. The appeal is from an order sustaining a demurrer to the complaint on the ground that it did not state facts constituting a cause of action.

subsequent law, because of the assent of the member, may add new terms or conditions to a certificate, terms or conditions reasonably calculated to promote the general good of the membership, and may be valid and binding. it does not follow that a law operating a destruction of a certificate, or a deprivation of all rights under it, would be of any force." — *Supreme Commandery v. Ainsworth*, 71 Ala. 436, 451.

"The rights of members in these associations must, of course, depend upon the articles or by-laws, to which all members assent when becoming such; and, generally speaking, the same body which is authorized to make by-laws can change, amend, or repeal those already made; and to this Thibert agreed when he joined. But changes, amendments, and repeals are subject to the restrictions and limitations of the by-laws themselves, as well as those of the charter or articles of association, and are also subject to the implied condition of being reasonable. Bacon, Ben. Soc., § 91a, and citations." — *Thibert v. Supreme Lodge*, 81 N. W. 220, 223-4. (Minn.)

The material conditions of the bond, which is set out in the complaint, are as follows:

"The aforesaid company [the plaintiff] shall, * * * subject to the conditions and provisions herein contained, * * * make good, and reimburse to the said employer, such pecuniary loss as may be sustained by the employer by reason of the fraud or dishonesty of any or either of the employees [of whom defendant was one] named upon said schedule, or added thereto, as hereinafter provided, in connection with his duties as receiving agent or buyer: * * * Provided, * * * that the company shall be liable only for the acts of fraud or dishonesty on the part of the persons mentioned in the schedule, who act as receiving agents for shortages in their grain accounts, as follows, viz.: There shall be deducted from the total amount of grain and dockage received by the receiving agent at said elevator or elevators screenings and dirt from such grain as has been cleaned at said elevator or elevators, together with the amounts of shipments based upon weights of grain and dockage at terminals; and if the result shows a deficit, and the shortage is not caused by the various exceptions agreed to, this proof of loss will be accepted as binding on the part of the company. In case where screenings and dirt are burned at an elevator, they shall be weighed before being burned, and the weight reported daily to the employer: provided, that the company shall not be liable for the grading of grain, loss by heating, drying, or leakage of cars, or other damage, shortages caused by defective weighing apparatus or appliance, or for shortages in any elevator or elevators caused by the failure of any of the parties mentioned in said schedule to take dockage enough to make good their weights for grain checks issued, as the employer hereby assumes the risks of its superintendents, traveling men, and officers in giving instructions to its receiving agents as to the amount necessary to take to make good the amount of dockage at terminal points, and the action of receiving agents in taking dockage, the loss by cleaning grain, and the ordinary shrinkage arising from dust in handling of said grain in elevators. And it is further agreed that the company shall not be liable for errors or carelessness in weighing of grain, nor for thefts of grain by persons other than those covered by this bond, nor for robbery or thefts of money from the persons so covered, where proofs of such errors, carelessness, thefts, or robbery are conclusive, as negligence is not covered by this bond."

The complaint alleges that defendant, in consideration of plaintiff's becoming a guarantor for him by executing this bond, agreed to indemnify it against any losses, damages, or expenses it might sustain or become liable for in consequence of executing the bond; also, that this bond was in the form requested by the defendant; also, that defendant further agreed "to admit the voucher or other proper evidence of such payment by plaintiff as conclusive evidence against himself as to the fact and extent of his liability to this plaintiff." It is further alleged that defendant, within the scope of his employment as receiving agent of plaintiff, issued tickets for, received, and took in, at one of the elevator company's elevators, a certain number of bushels of wheat and dockage, but, of the same,

only delivered to the elevator company a certain less number of bushels at the termination of his employment; leaving nearly 1,000 bushels which he never delivered, although requested to do so. The complaint then states specifically the manner in which this shortage was ascertained and made to appear, which was the exact manner provided for in the bond. It then negatives specifically that this shortage was caused by any of the exceptions named in the bond. It is then alleged that the elevator company presented its claim for this shortage to the plaintiff; that the latter was compelled to pay the same, and now holds the elevator's voucher for the same, but that defendant refuses to indemnify the plaintiff for the money thus paid out in his behalf. Counsel for plaintiff asks us to pass upon numerous questions touching the construction of this bond; but as it is a novel contract, and its provisions prolix, somewhat obscure, and sometimes apparently contradictory, we deem it unwise, upon a demurrer, to decide much except what is necessary to determine whether a cause of action is stated. Hence we shall confine ourselves mainly to the specific objections made by defendant's counsel to the sufficiency of the complaint.

1. The first objection urged against the complaint is that it does not allege that the plaintiff had a license to do an insurance business in this State, as required by Gen. St. 1894, § 3331. Notwithstanding that there would seem to be some decisions holding otherwise, we are of opinion that the case is one where the maxim, "*Omnia rite acta præsumentur*," is applicable. Noncompliance with the laws of this State will not be presumed, but, if it exists, must be set up in defense. *Williams v. Cheney*, 3 Gray, 215.

2. The second point urged is that a contract guarantying the honesty of employees is void as being against public policy; that it is the duty of all employers dealing with the general public to employ honest agents; that the effect of such a contract as set out in the complaint is to make it a matter of indifference to an elevator company whether it employs honest or dishonest agents to deal with the patrons of the elevator. There is nothing whatever in this objection. The same principle is involved in every bond exacted from a public officer or a private agent as security for the faithful performance of his duties. And it is wholly immaterial whether the guarantor is a private person or an incorporated guaranty insurance company. The advantages of the latter over the former mode of suretyship, if properly conducted, are very apparent. 2 May, Ins., § 541.

3. The third objection is that the stipulation between the plaintiff and defendant that the voucher, or other evidence of payment

by plaintiff to the elevator company, should be conclusive evidence against the defendant as to the fact and extent of his liability to the plaintiff, is void as being against public policy. This question is not really involved in this appeal, but, as it is one which will necessarily arise at the very threshold of the trial of the action, it may properly be considered now. The right of a party to waive the protection of the law is subject to the control of public policy, which cannot be set aside or contravened by any arrangement or agreement of the parties, however expressed. Thus, an agreement to waive the defense of usury is void. So, also, according to the weight of authority, is an agreement, made at the time of contracting a debt, to waive the prospective right of exemption. The agreement under consideration is more than a mere enlargement of contractual rights, or the establishment of a rule of evidence. It provides that the plaintiff may, by his own *ex parte* acts, conclusively establish and determine the existence of his own cause of action. In short, he is made the supreme judge of his own case. The case is not at all analogous to the common provisions in building and construction contracts, by which the determination of some third person, such as the architect or engineer, as to the amount or character of the work, is made conclusive between the parties, in the absence of fraud or mistake. Nor is it at all analogous to a provision in an executory contract for the sale or manufacture of an article to the satisfaction of the buyer, where, if the article is declined, the parties are, in contemplation of law, left *in statu quo*. In the present case the attempt is to provide that, after the alleged cause of action has accrued, the plaintiff shall be the sole and conclusive judge of both its existence and extent. Such an agreement is clearly against public policy. If the provision had been that the voucher, or other evidence of payment, should be merely *prima facie* evidence of the fact and extent of defendant's liability — thus merely shifting the burden of proof, but leaving the defendant at liberty to rebut this *prima facie* evidence — although even then a somewhat drastic provision, we do not think that it could be held to contravene public policy. To that extent we think this provision is valid, but in so far as it assumes to make the voucher of payment by plaintiff conclusive of defendant's liability, it is void.

4. The fourth objection urged against the complaint is that, while the bond only covers acts of fraud and dishonesty, it contains no allegation that this shortage was caused by the fraud or dishonesty of the defendant. Whoever drafted this bond used language very loosely, and employed a great many words to express, or else conceal, very few ideas. But after taking it by the four corners, and

considering all its provisions, our construction is that the plaintiff was only bound to make good and reimburse the elevator company for loss sustained by reason of a shortage of grain caused by the actual fraud or dishonesty of the defendant. But the bond also provides how the existence and amount of a shortage shall be ascertained, and that, when thus ascertained, it shall be accepted as evidence that it was caused by the fraud or dishonesty of the defendant, and not by any of the various other causes, enumerated as exceptions, for which the plaintiff was not to be liable; in other words, that a shortage ascertained in the manner prescribed should be *prima facie* evidence of its existence, and that it was caused by defendant's fraud or dishonesty, thus casting the burden upon the plaintiff to rebut this *prima facie* case by proof. It is not bound to do this by affirmative evidence showing the particular one of the causes, enumerated as exceptions, which produced the shortage, but may do it by negative evidence showing that it was not caused by the fraud or dishonesty of the defendant, and hence must have been produced by one or more of the excepted causes. This it may do by a fair preponderance of evidence as to any of the excepted causes, except errors or carelessness in weighing, and thefts by persons other than those covered by the bond, in which cases the proofs must be conclusive. The word "*conclusive*," in that connection, we think, must be construed as meaning so strong as to require a finding or verdict that the shortage resulted from the cause alleged. This may also be done by negative or circumstantial evidence. So much for the construction of the bond.

The bond having been executed at the request of the defendant, and in the form requested by him, it follows that his obligation to indemnify the plaintiff is coextensive with that of the plaintiff to reimburse the elevator company; also, that any provisions in the bond, as to proof of liability, binding on the plaintiff in favor of the elevator company, are equally binding on the defendant in an action brought by the plaintiff against him to recover indemnity for what it has paid in his behalf. Therefore it follows that the complaint alleges facts which, under the provisions of the bond, constitute a cause of action against the defendant; that is, if all the facts alleged are proved on the trial, it would follow, as a matter of law, that the plaintiff would be entitled to recover. That the facts alleged are, in one sense, merely evidentiary, and may be rebutted by other evidence, is not material. inasmuch as, by the agreement of the parties, they make out *prima facie* a cause of action, and if not rebutted they conclusively make it out. Otherwise expressed, under the contract of the parties, the facts alleged prove that the

shortage was caused by defendant's fraud or dishonesty. Under these circumstances, an express and direct allegation that it was so caused was unnecessary. The complaint states a cause of action. Order reversed.¹

¹ In *American Surety Co. v. Pauly*, 170 U. S. 133, the bond was given by the company to a bank to indemnify the bank against loss arising from the fraud or dishonesty of its cashier. It was held (1) Under the clause in the bond requiring the bank to notify the company of "any act" of the cashier which might involve a loss for which the company would be responsible "as soon as practicable after the occurrence of such act shall have come to the knowledge" of the bank, notice of suspicion of the cashier's dishonesty was not required to be given, but it was the duty to give notice when "satisfied that the cashier had committed acts of dishonesty or fraud likely to involve loss" to the company upon the bond. (2) The act of the president of the bank in giving a certificate required by the company, of the cashier's character, was not authorized, nor within the scope of his employment, and the president's concealments or misrepresentations with respect to the certificate were not to be imputed to the bank. (3) The cashier was held to be in the service of the bank after the suspension of the bank, while it was in the hands of the national bank examiner, and at least until the appointment and qualification of the receiver, although the cashier ceased to perform the ordinary duties of cashier, after the suspension of the bank. As the bond was to cover losses occurring during the continuance of the bond and which should be discovered within six months thereafter, losses would at least be covered which were discovered within six months from the appointment and qualification of the receiver.

In *Fidelity and Casualty Co. v. Gate City Bank*, 97 Ga. 634, a bond was given to the bank by the company to indemnify against loss by the fraud or dishonesty of Redwine, who, as assistant cashier, was covered by the bond. The court said: "The main question in the case is whether or not, under the stipulations expressed in the contract, the knowledge of the bank's cashier of fraud or dishonesty on the part of Redwine, or of any act done by him involving a loss to the company of more than \$100, was imputable to the bank itself. * * * There is not a syllable in the contract, however, bearing the construction that the bank should exercise any degree of diligence in inquiring into or supervising the conduct of Redwine, in order that the company might be saved from loss through his misconduct. The bank did not undertake to exercise reasonable care and diligence to find out if Redwine had become untrustworthy; but as to this matter, the company, in effect, invited the bank to repose in peace; for it guaranteed that Redwine would remain honest and faithful. Only after knowledge had actually come to the bank that he was, or had become, otherwise, was it under any duty to the company; and then it was only required to immediately notify the company of what it had ascertained. * * * In the absence of any guarantee on the part of the bank that its other employees would be honest and faithful, and in view of the purpose of the condition inserted in the bond, it would seem that the better construction of it would be that the bank only obligated itself to act in good faith and impart only *actual* knowledge on its part. The bond would, indeed, be of no practical protection if, in order to realize its benefits, the bank had to insure, not only the honesty

3. TITLE GUARANTY INSURANCE.

QUIGLEY v. ST. PAUL TITLE INSURANCE CO.

60 MINN. 275. — 1895.

CANTY, J. — On the 1st day of July, 1889, one Amelia Kingsley was the owner of a certain city lot in St. Paul, and was then erecting a building thereon, which was not completed for several months thereafter. She procured a loan of \$2,200 of plaintiffs' intestate, John O. Quigley, and mortgaged the lot to him to secure the repayment of the same. The mortgage is dated on that day, but was not recorded until October 22, 1889. The business of the defendant corporation is that of insuring titles, and on September 20, 1889, a written application was made to it by Quigley's agent to insure the title of this lot to the extent of the mortgage interest of Quigley therein. The application was accepted, and a policy of insurance dated October 22, 1889, issued to Quigley accordingly. Thereafter Quigley foreclosed the mortgage, and bid the lot in at the foreclosure sale. The time to redeem expired on February 26, 1892. No redemption was made, and Quigley became the owner of the lot. But between October 10, 1889, and April 10, 1890, work and labor of the value of \$95 was performed for Mrs. Kingsley in painting the building as a part of the erection of the same. A mechanic's lien was filed therefor. Suit was brought to foreclose the same, in which Quigley was made a party, and a judgment of foreclosure was entered, adjudging the mechanic's lien paramount to the lien of the mortgage. The lot was sold to satisfy the judgment, and the time to redeem from that sale expired on August 18, 1892, and no redemption was made. This divested the title of Quigley which he had acquired under his foreclosure sale nearly six months before. The defendant was duly notified by Quigley of the commencement of the suit, and undertook and conducted the defense of the same in the name of Quigley under the provisions of the policy. The complaint in this action alleges that Quigley was in his lifetime a resident of New York, and that neither he nor these plaintiffs had

and fidelity, but the faithful and conscientious attention to duty, of a dozen others of its employees. Stupidity of an employee in not comprehending ordinarily apparent facts and circumstances which would be equivalent to actual knowledge if within the knowledge of the bank itself, might lead to a forfeiture of the bond; while forgetfulness or mere negligent inattention to duty on the part of such employees would bring about the same result. The cashier, according to the undisputed testimony in this case, was a mere employee. Unless the bank obligated itself to use his eyes and ears, it had no *knowledge* of Redwine's misconduct * * *

any knowledge or notice of the entry of said judgment, nor of the sale under it, until after the time to redeem from that sale had expired. The action is brought to recover from defendant as damages the value of the lot — which is alleged to be \$3,500 — on the ground that it was the duty of defendant to indemnify and save harmless Quigley and these plaintiffs from this mechanic's lien, and that defendant was negligent in failing to satisfy the lien, and in failing to pay the sum necessary to redeem from the sale under the judgment before the time to redeem from that sale expired, and in failing to notify plaintiffs that it did not intend to redeem, and thereby give plaintiffs an opportunity to do so. The case was tried by the court below without a jury. Judgment was ordered for plaintiffs for \$2,200 and interest, and each party made a motion for a new trial, and appeals from an order denying such motion. * * *

2. We will next consider plaintiff's appeal. It appears by the bill of exceptions that on the trial plaintiffs offered to prove that at the time their title to the lot was divested by the expiration of redemption on the mechanic's lien foreclosure, the lot was worth \$3,200. Defendant admitted that at that time the lot was worth more than \$2,200, and objected to the offer as incompetent and immaterial. On this admission the court sustained the objection, holding that by the terms of the policy the limit of defendant's liability was \$2,200, and this ruling is assigned as error. We are of the opinion that this assignment of error is well taken. The policy, by its terms, limits the liability of the defendant for loss on account of certain kinds of defects and incumbrances to \$2,200. But this limitation on its liability does not apply where the loss is caused by its own negligence in the performance of duties which it assumes to perform under the contract. The following are all the parts of the policy which we deem material on the question now under consideration: The defendant, "in consideration of the sum of \$22 to it paid, doth hereby covenant that it will for the period of 25 years from the date hereof indemnify, keep harmless, and insure John O. Quigley, New York, the mortgagee named in a certain mortgage executed by Amelia Kingsley, * * * from all loss or damage not exceeding twenty-two hundred dollars, which the said insured shall, during said period of twenty-five years, sustain by reason of defects in the present title of said mortgagors to the real estate or interest described in Schedule A, hereto annexed, or by reason of liens or incumbrances affecting the same at the date hereof, or by reason of any defect apparent of record in the execution or filing for record of said mortgage, excepting only such as are set forth in Schedule B; subject to the conditions and stipulations hereinafter contained,

and, together with said schedules, made a part of this policy." Attached to the policy, and made a part of the same, are, among others, the following stipulations and conditions:

"(1) This company will, at its own cost and charge, defend the insured in all actions of ejectment or other proceedings founded upon a claim of title or incumbrance prior in date to this policy, and not herein and in Schedule B excepted; reserving, nevertheless, the option of settling the claim, or of paying the amount of its liability at that time under this policy; and payment, or tender of payment, of such amount shall determine all liability of the company under such claim. In case any such action or proceeding is begun, it shall be the duty of the insured to notify the company thereof in writing, within ten days after service of the summons therein, and secure to it the right to defend the action or proceeding, and to give all possible assistance therein; but such defense by the company shall not change or alter the rights or obligations of any of the parties hereto. If such notice shall not be so given and such right to defend be secured to the company in such action or proceeding, then this policy shall be void."

"(3) As long as the interest of the insured in said real estate consists of a mortgagee's interest and subject to redemption, the company may, at its option, at any time, if it shall deem such action necessary for its protection under this policy, pay the amount then remaining unpaid on said mortgage, and in that case the mortgagee or his assigns shall, by proper instrument, assign to this company said mortgage, together with the indebtedness secured thereby, or the proportion thereof remaining unpaid."

"(5) No right of action shall accrue under this policy * * * until the insured (unless absolved by the company) has, at the company's option, either assigned or conveyed, or in writing agreed on demand to assign and convey to the company, or such person as it may name, all the right, title, and interest of the insured in and to said above-described real estate or interest, at the following price, viz.: (a) As long as the interest of the insured shall continue to be a mortgagee's interest, or still subject to redemption, the price to be paid shall be the amount then remaining unpaid on said mortgage indebtedness, or the amount necessary to permit such redemption. (b) If the interest of the insured shall by foreclosure and the expiration of the period of redemption have matured into an ownership in fee simple, the price to be paid, unless determined by mutual agreement, shall be the amount bid at said foreclosure sale, with interest thereon at legal rate from the date of such foreclosure sale, together with any and all subsequent expenditures by the insured for improvements, taxes, or assessments on said real estate, with interest at the legal rate on each of such expenditures from the date of the making thereof, less any sum or sums received by said insured from any partial redemption or sale of said real estate. (c) Any payment under this policy, whether made as the consideration of any such assignment or conveyance as aforesaid or otherwise, shall reduce the liability of the company hereunder by the amount of such payment."

"(7) Claim under this policy having been settled, the company shall be subrogated to all rights of action and remedies for recovery; and the insured hereby assigns and warrants to the company such rights, and agrees that his name may be used in all lawful proceedings therefor. If the payment does not

cover the loss of the insured, the company shall be interested in such rights with the insured in the proportion of the amount paid to the amount of the loss not hereby covered; and the insured warrants that such rights of subrogation shall vest in the company, unaffected by any act of the insured."

It will be seen by an examination of the provisions in the body of the policy, above quoted, that the defendant agreed to indemnify, save harmless, and insure Quigley against loss from three different causes: (1) "Defects in the present title;" (2) "liens or incumbrances affecting the same at the date hereof;" (3) "any defect apparent of record in the execution or filing for record of said mortgage." Its liability for loss from these three causes is expressly limited to \$2,200, and the insured has a right to recover that amount of loss arising from any or all of these three causes alone, and this fairly implies that, if his loss arises from some other cause besides these three, this limitation does not cover it also. In this case it is claimed that his loss does, at least in part, arise from some other cause, to wit, that of the negligence of defendant. Under said section or subdivision 1 of the stipulations and conditions attached to the policy, the defendant has the option to defend the suit, or pay the claim on which suit is brought, or pay the insured the amount of its liability under the policy. If it elects to defend the suit, it must be held to do so for its own benefit, and must exercise reasonable care; if it fails to do so, it is liable for any loss caused by such failure, and the limitation above quoted does not apply. Neither does the provision, "but such defense by the company shall not change or alter the rights or obligations of any of the parties hereto," contained in said section 1, relieve the company from liability for its negligence, but it also implies that such defense will be conducted with reasonable care, and must be read as if that condition was expressly attached to it. Even if the claim on which the suit was brought was one against which defendant had not insured the title, and against which it was not obliged to defend, still, if it voluntarily undertook to indemnify the insured, and defend the suit for him, it would be obliged to use reasonable care, and would be liable for its negligence or misconduct by reason of which he was misled and injured. It may be proper here to remark that no claim is made that the lien in question is not covered by the policy of insurance. Neither is it claimed that subdivision or section 5 above quoted in any manner limits the amount of recovery, and we cannot see that its provisions have any other effect than that of creating a condition precedent to the commencement of the action. It certainly cannot be held that the option there provided for must be held open so as to give the insurer a

chance to speculate on the amount of the verdict, and accept the option afterwards if more favorable to him than the verdict. Neither would the prices there provided for be in any sense the measure of damages. We are of the opinion that it was error to exclude the testimony offered.

The court also excluded the affidavit of one Stevens, who was an officer of the defendant corporation, and who was acting within the apparent scope of his authority when he made the affidavit, in which he set out the reasons why defendant failed to redeem the lot from the mechanic's lien foreclosure sale. The evidence was competent as an admission tending to prove negligence on the part of the defendant, and it should have been received. This disposes of the case. The order denying defendant's motion for a new trial is affirmed, and the order denying plaintiffs' motion for a new trial is reversed, and a new trial is granted.

MINNESOTA TITLE INSURANCE CO. *v.* DREXEL.

70 FED. 194; 36 U. S. APP. 50. — 1895.

CALDWELL, C. J. — The only error assigned is the overruling of the demurrer to the complaint. The contention of the learned counsel for the plaintiff in error is that the foreclosure of the mortgages by notice and sale, and the purchase of the mortgaged premises by the mortgagee for the full amount of the mortgage debt, "canceled the mortgage debt as completely as though it had been paid in cash," and that such satisfaction of the mortgage debt inures to the benefit of the insurer, and absolves it from liability on its policy as fully as if the mortgage debt had been extinguished by a cash payment made by the mortgagor. The contention is not sound. The cases cited by counsel to support this contention have no application to this case.

The case at bar depends upon the construction of the policy of insurance, and the same liberal rules of interpretation that apply to fire and other policies of insurance are applicable to the policy in suit. The policy in suit, on the point in question, is not ambiguous, nor its meaning doubtful; but if there was room to doubt as to its proper interpretation, the doubt would have to be resolved in favor of the insured, according to the settled canon of construction applicable to such contracts. *National Bank v. Insurance Co.*, 95 U. S. 673, 678; *Thompson v. Insurance Co.*, 136 U. S. 287, 297, 10 Sup. Ct. 1019; 2 Whart. Cont. 670; *Kahnweiler v. Insurance Co.*, 14 C. C. A. 485, 67 Fed. 483.

The insurer is not a surety. The defendant company, for an adequate consideration, agreed to "indemnify, keep harmless, and insure" Drexel, the mortgagee, "from all loss or damage, not exceeding \$55,000," the amount of the mortgage debt, which he or his assigns might sustain by reason of defects in the title to the mortgaged premises, or by reason of liens or incumbrances thereon existing at the date of the policy. The contract is plain and explicit on this point. In a word, it is a guaranty that the mortgagee should not suffer any loss or damage by reason of defects in the title to the property, or liens or incumbrances thereon, existing at the date of the policy. Under this guaranty, if the mortgaged property, with a clear title and free from incumbrances, was worth the amount of the mortgage debt, the mortgagee could confidently rely upon the sufficiency of his security. The mechanics' liens upon which the mortgaged property was sold were liens upon the property at the date of the policy. The defendant company, nevertheless, refused either to pay these prior liens, or to pay the insured the amount bid for the property at the foreclosure sale, which was the amount of his mortgage debt, thus forcing the insured, in order to protect his security and his title, to redeem the property from the sale on the mechanics' liens.

The policy provides that, where by foreclosure the insured has acquired the title to the property, the price to be paid by the insurer "shall be the amount bid at said foreclosure sale." The defendant was obligated, by the terms of the policy, either to pay this amount, or to relieve the property from all liens existing thereon at the date of the policy. It refuses to do either, and seeks to escape all liability by putting the burden of freeing the property from the liens existing thereon at the date of the policy upon the mortgagee, on the ground that, at the sale of the property under the mortgages, the mortgagee bid the full amount of his mortgage debt, and thereby himself assumed the burden of paying off the mechanics' liens. Under the terms of the policy, the mortgagee had a right to look to the defendant for the extinguishment of all liens upon the property which existed at the date of the policy, and to gauge his bid on the assumption that the defendant would discharge its obligation in this regard. The contention of the defendant is in the teeth of a very plain provision of the policy which declares:

"Payment, discharge, or satisfaction of said mortgage indebtedness (except by foreclosure of said mortgage) * * * shall fully terminate, annul, and avoid this policy, and all liability of the company thereunder."

The case at bar fails directly within this exception. We need not

consider what effect this provision would have where the property was purchased by a stranger at the foreclosure sale. Beyond controversy, it includes and binds the parties to the contract, and is applicable to every case where the mortgagee, insured, becomes the purchaser of the property at the foreclosure sale for the amount of his mortgage debt.

The judgment of the Circuit Court is affirmed.

PART V.

LIMITS OF THE CONTRACTUAL OBLIGATION.

I. BENEFICIARIES.

a. Fire Insurance.

1. IN GENERAL.

QUARLES *v.* CLAYTON.

87 TENN. 305. — 1889.

LURTON, J. — The deceased husband of appellant took out a policy of fire insurance upon his dwelling, loss payable to the assured, his executors, or administrators. Before the expiration of the policy by time, but after the death of the assured, the house was accidentally burned. The insurance company, by consent of the claimants, paid the loss into the hands of the defendant, under an agreement that the fund should be held subject to the legal rights of complainant, if any she had, to be thereafter determined by the courts. An agreed case was made up and submitted to the Chancery Court, and from the decree of the Chancellor Mrs. Quarles has appealed.

Appellant is the widow of the assured, and claims a life estate in the fund upon the following state of facts:

Before her marriage to the assured a marriage contract was entered into and duly executed in the county of their residence, by which, among other things not material to be here mentioned, it was agreed:

“ That all the property and estate, both real and personal, now owned or hereafter to be acquired by said John W. Quarles, shall continue to be his, and shall remain wholly unaffected by said contemplated marriage with said Mrs. Nancy M. Kirk, in favor of whom no marital or other rights in his said property and estate shall attach or inure by virtue of said contemplated marriage relation, further or otherwise than is expressed and provided in this instrument, and he hereby reserves the right and privilege of making such suitable provision for her out of his estate as he may at any time desire, either by deed of

gift, last will and testament, or otherwise. If he die without making any such provision for her, then she shall, out of his real estate, if she survives him, have a comfortable home, to consist of say about one hundred and forty acres of his lands, *in which will be included his dwelling and out houses*, the same to be surveyed and laid off to her by proper metes and bounds, and in such manner as will be most useful and convenient to her, and with least injury to his estate. This home so laid off to her to be and remain to her own proper use, support, and benefit for and during the term of her natural life, and after her death to take such directions as he may give to it by his last will and testament, or other proper mode of disposing of real estate, and if he die without any will, and without disposing of the remainder interest in said 'home' as above provided for and described, then the same shall descend to his proper heirs, and be distributed according to the laws of the State of Tennessee."

After the marriage the dwelling-house above described, which was then and after the residence of Mr. Quarles and wife, was insured, under a contract, as before stated, that the loss should be paid to the assured, the husband of appellant, his executors, or administrators. Mr. Quarles died intestate, and without having made any provision for his widow other than that contained in the marriage contract. The widow continued to occupy the dwelling as her residence until it was destroyed by fire. The portion of the farm of the decedent which was to be assigned to her under the marriage agreement had not at the time of the fire been laid off by metes and bounds, but this was subsequently done to the satisfaction of all concerned. This estate was so laid off, as required by the contract, as to include the out-houses of the assured, and likewise the site of the burned mansion house. The insurance policy was not taken out upon any agreement or contract, express or implied, that she was to have any interest whatever therein.

Under this state of facts, has appellant any equitable or legal interest in the proceeds of this fire policy? That the precise boundaries of the one hundred and forty acres to be laid off to her had not been ascertained by survey at the time of the fire can cut no figure, because it was to be laid off in all events so as to include the mansion house and out-houses. It seems equally clear that she cannot hold the estate of her husband responsible for the value of the house, because at his death her contingent right to the house for her life ripened and became a vested interest for her life, and at the moment her husband died intestate, and without having made any other provision for her, the house was standing, and her right to the use and possession at once accrued. Her interest became at once an insurable interest, and the destruction of the house by any means after her husband's death was not an injury for which his estate or his heirs would be responsible.

Whatever right she had to any interest in this fund must arise from the contract of insurance. The person assured against loss in the policy paid upon the premises of Mrs. Quarles was the owner himself. By all the authorities, a contract of fire insurance is a personal contract, and assures the interest alone of the assured in the property, in the absence of some agreement or trust to the contrary. The policy taken out by Mr. Quarles contained the usual provision prohibiting any assignment of the policy without the consent of the insurer. It also contained the further stipulation that the policy should become void "in case any change shall take place in title or possession, *except by succession by reason of death of the assured.*" These provisions have been upheld by the courts as reasonable conditions, limiting and restricting the liability of the insurer. That they are reasonable is obvious when we consider that the contract is one for the personal indemnity of the assured against a loss affecting his interest in the property covered by the policy. The insurer contracts with reference to the character of the assured for integrity and prudence. He might be very willing to agree to make good the loss of one by the destruction of property owned by him, while he would be altogether unwilling to insure the same property if owned by another. Again, the contract undertakes to make good any loss which the assured may sustain, and from this it follows that if the assured has parted with his interest before the loss, he cannot ask to be indemnified because he has sustained no loss. The provision against change of title is therefore in precise harmony with the personal character of the contract. In some fire insurance contracts the stipulation against change of title extends so far as to make the policy void should such change of title be brought about by the death of the assured. The title in such case is no longer in the assured, but has by the law passed to his heirs, or by will to his devisees, and a change of title so accruing has been held to defeat an action for a loss occurring after the death of the assured. *Sherwood v. Agricultural Insurance Company*, 73 N. Y. 447; s. c., 29 Am. Rep. 180; *Hine v. Woolworth*, 93 N. Y. 75; s. c., 45 Am. Rep. 176.

The contract is not therefore one which attaches to or follows the property, being one for the personal indemnity of the assured, and when the insurer does not assent to the assignment of the policy to the grantee of the property, neither the assured nor his assignees of the property can recover upon the policy. *Hobbs v. Insurance Company*, 1 Sneed, 444.

But this policy was not annulled by the change of title which occurred by the death of the assured. It expressly provides that a change of title shall defeat the policy, except where it occurs "by

succession by reason of the death of the assured." The legal effect of this exception is to continue and extend the policy, notwithstanding the change of title by death of the assured. In whose favor is this continuance? It has been ably argued that the effect of this continuance is in favor of those who, by "succession," take the property covered by the risk, and that though it may be payable to the executor or administrator of the assured, yet he will, in case the risk was upon real estate, take and hold in trust for those who, by succession, have taken the property, and who are therefore the persons damaged by the loss. This word "succession," in the connection in which it appears, is a word of technical meaning, and refers to those who by descent or will take the property of a decedent. It is a word which clearly excludes those who take by deed, grant, gift, or any former purchase or contract. This meaning is made more obvious when we consider that the contract provided against *any change* of title except by succession, and to more directly affix a limited and technical meaning, the explanatory words added, "*by reason of the death of the assured.*"

There is much plausibility in the argument that inasmuch as the policy is continued, notwithstanding a change of title has occurred, that in case the risk is upon real estate, that the extension is by intendment of the contract to operate as an indemnity to those who by "succession" have become the owner of the property. In such a case the administrator or distributee would not have any interest to be insured, while the heir or devisee, upon whom the title has been cast, would be the legal and equitable owner and the person to suffer by loss.

The root principle of insurance being that the loss is payable only to the extent that the assured had an insurable interest, would seem to preclude the administrator in such a case from any recovery, or make him a trustee for the heir of what he should recover when the loss occurred after the property had passed by "succession" to the heir. This seems to be the holding of the courts when the question has arisen, although the text-book writers seem not to have seized upon the distinction. *Wyman v. Wyman*, 26 N. Y. 253; *Culbertson v. Cox*, 29 Minn. 309; s. c., 43 Am. Rep. 204. But does the appellant take any interest in the insured property by succession? If she had taken as dowress, or under the homestead laws, she would be within the principle just discussed, and would be within the express holding of the two cases last cited. Unfortunately for this litigation, appellant takes whatever interest she has in the property under the fire policy by virtue of her marriage contract. She is not entitled to homestead or dower, for she expressly agreed to take in

lieu of all rights which the law would have given her, the provision which she covenanted for by marriage contract. This interest was a contingent one. It depended upon two events — first, that she should survive her husband; and second, that he should not, by deed or will, make any other provision for her. Both of these events occurred, and instantly upon the death of her husband she became seized of an estate for her life in the insured premises. She therefore took this mansion house as the grantee of her husband and did not take it by "succession." But it is insisted that, however she acquires her estate, she has an equitable interest to a life estate in this fund, because it represents the premises which she had a right to occupy and enjoy during her life. This presents a strong case in morals, but her legal rights are not so clear. The rule is well settled that no equity attaches upon the proceeds of a fire policy in favor of third parties who, in the character of grantee, mortgagee, or creditors, may have sustained loss in the absence of some trust or contract to that effect. May on Insurance, § 456; 3 Kent's Comm., 10th ed., 499.

This rule applies as well to vendors and lienors of every class as to mortgagees who may have had their security impaired by a loss by fire. This court, in a well-considered case, held that the holder of a mechanic's lien upon a building had no equitable lien on a fire policy effected by the owner and assigned to a mortgagee. *Galyon v. Ketchen*, 1 Pickle, 55.

An equity will attach where the vendee or mortgagor was, by covenant or otherwise, bound to insure the property for the better security of the vendor or creditor. In such case the latter would have, to the extent of their interest in the property destroyed, an equitable lien upon the money due on a policy taken out by the mortgagor or vendee, or other debtor who had given a security upon the insured property, and this would be so even though the policy stood in the name of the debtor, vendee, or mortgagor. But in the absence of some such agreement the mortgagor, or vendee, or grantee, having an insurable interest, might insure such interest for his own benefit, and no lien would attach thereto in favor of his creditors secured by lien or mortgage, or otherwise, upon the insured property. *Carter v. Rockett*, 8 Paige (N. Y.) 436; *Wheeler v. Insurance Co.*, 101 U. S. Rep. 436; *Nordyth v. Gery*, 112 Ind. 535; s. c., 2 Am. Rep. 219; Sheldon on Subrogation, §§ 233-235.

The agreed state of facts upon which this case is submitted fails to show any covenant, contract, agreement, or understanding, that Mr. Quarles should insure this property for the benefit of appellant. The interest of appellant after the death of her husband was an

insurable one; so was the remainder interest of the heirs. The decedent having left no debts, and the distributees being the same persons who take the real estate as heirs, no controversy can arise between the administrator and the remaindermen. That the insurance company had the option to rebuild is urged as a reason why the insurer's election to pay instead of rebuild ought not to operate to the disadvantage of complainant. This option is one common to all contracts of fire insurance, and the agreement, if good in this case, would operate to overturn the well-settled rule that no equity attaches to the proceeds of a fire policy in favor of third persons who have suffered loss in the absence of some agreement to that effect. If this option to pay or rebuild should be granted as a sufficient ground to found an equity upon in favor of a third person disappointed by the election of the insurer, the law of insurance would have to be rewritten. There is no privity between appellant and the insurer, and no action of his can be ground to give her an interest which she would not otherwise have.

The decree of the chancellor will be affirmed.

PEOPLE'S STREET RAILWAY CO. *v.* SPENCER.

156 PA. 85. — 1893.

ACTION brought by the corporation against Spencer to determine the rights of the parties to certain money deposited by a fire insurance company in payment of a loss by fire. The company had been the owners of the property in question, and in consideration of a payment of \$20,000 by Spencer, a conveyance of the property was executed to him and a lease back to the company at a nominal rent with no change of possession, which remained all the while in the company. This arrangement included the giving by Spencer to the company of an absolute and exclusive option to repurchase at the end of the year for the same sum with interest. At the end of the year the company paid up the interest, and the arrangement was renewed for another year. During the continuance of the agreement the company effected an insurance upon the premises and paid the premium. In the policy the company were described as the assured, and there was inserted therein the following clause: "The interest of the assured in the above described building is the right to purchase from A. D. Spencer, owner; and, in case of loss, the insurance is payable to him, as his interest may appear under said contract." The property was destroyed by fire. and pending this action (which

was instituted as the result of an agreement between the company and Spencer) the company exercised the option to purchase and took a conveyance upon the payment of the purchase money.¹

MITCHELL, J. — All the facts appear in the writings set forth in the plaintiff's statement. None of the papers which are merely referred to, but not set out in full, seem to be essential to the cause of action, and the omission to give them in full is not therefore fatal. The affidavit of defense raises no issue of fact, for it denies no part of the statement, except the inferences from the face of the papers. The case was therefore one for the court to decide upon the statement and affidavit. All the writings constitute parts of one transaction, and the nature of that, beyond question, was a conveyance of the land as security for the repayment of a loan of money. It starts with admitted title in the company (appellee); then a conveyance to appellant for \$20,000; a contemporaneous lease from appellant back to the company, at a nominal rent of \$1, with no change of possession, which remained all the time in the company; and an absolute and exclusive option in favor of the company to repurchase at the end of the year for the same amount — \$20,000 — with interest; that is, to resume its original title on payment of the loan. At the end of the term the arrangement was extended, or renewed for another year, during which the option was exercised by the company, the money paid, and the title reconveyed by the appellant. It is unimportant what name we apply to the relation of the parties during the year. Whether technically vendor and vendee, mortgagor and mortgagee, or lessor and lessee, is immaterial. The nature of the relation is incontestable. Appellant was the holder of the legal title, subject to an equity in the company. It is strongly argued for appellant that his interest at the time of the fire was an absolute fee-simple title. But this is an error. It was not absolute. It was the legal title in fee, but subject to the equitable interest of the company — an interest in the land, capable of being specifically enforced, and good, not only against the appellant, but all others, creditors, purchasers, or strangers, to whom the recorded deeds and the company's possession gave notice.

The only substantial question in the case is the date at which the company's equity became complete. The fire took place during the running of the term. The option to redeem was exercised after the fire had occurred. Did the company's interest begin to run only from the exercise of its option, or did it, upon that event, relate

¹ This abridged statement of facts is given by Professor G. W. Pepper in his extended comment on this case, 33 *Am. Law Reg.*, N. S. 134.

back for all purposes to the beginning of the transaction? We are of opinion that both principle and authority sustain the latter view. As already said, the transaction was in substance a loan of money, and appellant's right was to have his money back with interest at a specified time, or, in default of that, to have his title become absolute. The insurance was for his protection, not to increase his profit; to keep up the sufficiency of his security while the loan lasted, or make good the value of his purchase if it became absolute. For that reason it was to be kept up by the appellee. If the latter had exercised its option before the fire, there could have been no question that the insurance money would have belonged to it. But the date of the fire makes no substantial difference when, as was the case, the appellee elected to repay the loan, and resumed its title. On the happening of that contingency, the appellant got his money, with interest, which was all he was entitled to, while the appellee got back its land, lessened in value by the fire, but the loss compensated by the insurance money. The insurance was, in contemplation of law, for the benefit of whomever should be entitled when the option was exercised or expired by default, and, in fact, it was contracted for "as interest may appear." It stood in place of so much of the property as was destroyed by the fire, and followed the title when the equitable and legal interests united. The authorities, so far as we have any analogous cases, lead to the same conclusion. It was held in *Kerr v. Day*, 14 Pa. St. 112, that an option to purchase is a substantial interest in land, which may be conveyed to a vendee, and the English chancery cases were reviewed by Bell, J., with the result that, "when the lessee made his option to purchase, he was to be considered as the owner *ab initio*. Indeed, the determination can only be supported by attributing to the lessee an equitable estate in the land, under his covenant for an optional purchase, which passed to his alienee, vesting him with the right to call for a specific execution on declaring his election." And in *Frick's Appeal*, 101 Pa. St. 485, where the land was sold upon a prior judgment before payment or conveyance, it was held that the surplus was the property of the optional vendee. It is true that the option in that case had been exercised before the levy and sale, but that circumstance was not of controlling weight, as the decision was put on the ground that "in equity the vendee became the owner, subject to the payment of the price stipulated. His right of property therein flows from the contract, and exists before any purchase money may have been paid;" citing *Siter's Appeal*, 26 Pa. St. 178. We are of opinion that, upon the exercise of its option to redeem, the appellee's equitable title reverted back to the date of the original

agreement, and appellee became the owner of the land as it was at such date, or of the insurance money which stood *pro tanto* in its place.

Judgment affirmed.

WILSON v. HILL.

3 MET. 66. — 1841.

[*Reported herein at p. 1.*]

2. VENDOR AND VENDEE.

RAYNER v. PRESTON

18 CH. D. 1. — 1881.

APPEAL from a judgment of the master of the rolls dismissing the action. The plaintiffs purchased from the defendants a messuage and workshops. Between the date of the contract and the time fixed for completion the buildings purchased were injured by fire. The vendors had before the contract insured the buildings against fire, but there was not in the contract any mention of this fact, or of the policy. The plaintiffs brought an action to establish their right to a sum received by the vendors from the insurance office, or to have it applied in or toward reinstating the buildings injured. The master of the rolls decided against their claim, and from this decision the plaintiffs appealed.

BRETT, L. J. — * * * This action is brought by the plaintiffs against the defendants to recover money which is in the hands of the defendants; and therefore, if the action had been brought at common law, it would have been an action for money had and received. That action was always treated at common law as being founded upon equity, and therefore it seems to me that the decision in this case, whatever it ought to be, would be the same whether it should be considered to be a decision at common law or in equity.

It seems to me that the question raised between the plaintiffs and the defendants calls upon us to consider, first of all, the nature of a policy of fire insurance; and, secondly, what was the relation with regard to the policy and to the property between the plaintiffs and the defendants in this case. Now, in my judgment, the subject-matter of the contract of insurance is money, and money only. The subject-matter of the insurance is a different thing from the subject-matter of the contract of insurance. The subject-matter of insurance may be a house or other premises in a fire policy, or may be a

ship or goods in a marine policy. These are the subject-matter of insurance, but the subject-matter of the contract is money, and money only. The only result of the policy, if an accident which is within the insurance happens, is a payment of money. It is true that under certain circumstances in a fire policy there may be an option to spend the money in rebuilding the premises, but that does not alter the fact that the only liability of the insurance company is to pay money. The contract, therefore, is a contract with regard to the payment of money, and it is a contract made between two persons, and two persons only, as a contract.

In this case there was a contract of insurance made between the defendants and the insurance company. That contract was made by the defendants, not on behalf of any undisclosed principal, not on behalf of any one interested other than themselves. The contract was made by the defendants solely and entirely on their own behalf, and at a time when they had no relation of any kind with the plaintiffs. It was a personal contract between the defendants and the insurance office, to which they were the sole parties. It is true that under certain circumstances a policy of insurance may, in equity, be assigned, so as to give another person a right to sue upon it; but in this case the policy of insurance, as a contract, never was assigned by the defendants to the plaintiffs. It would have been assigned by the defendants to the plaintiffs if it had been included in the contract of purchase, but it was not. Any valuation of the policy, any consideration of increase of the price of the premises in consequence of there being a policy, was wholly omitted. There was nothing given by the plaintiffs to the defendants for the contract. The contract, therefore, neither expressly nor impliedly, was assigned to the plaintiffs; and, so far as regards the contract of insurance, there never was any relation of any kind between the plaintiffs and the defendants.

But there did exist a relation between the plaintiffs and the defendants, not with regard to the subject-matter of the contract, but with regard to the subject-matter of the insurance. There was a contract of purchase and sale between the plaintiffs and the defendants in respect of the premises insured. It becomes necessary to consider accurately, as it seems to me, and to state in accurate terms, what is the relation between the two people who have contracted together with regard to premises in a contract of sale and purchase. With the greatest deference, it seems wrong to say that the one is a trustee for the other. The contract is one which a court of equity will enforce by means of a decree for specific performance. But, if the vendor were a trustee of the property for

the vendee, it would seem to me to follow that all the product, all the value of the property received by the vendor from the time of the making of the contract, ought, under all circumstances, to belong to the vendee. What is the relation between them, and what is the result of the contract? Whether there shall ever be a conveyance depends on two conditions; first of all, whether the title is made out, and, secondly, whether the money is ready; and, unless those two things coincide at the time when the contract ought to be completed, then the contract never will be completed, and the property never will be conveyed. But suppose at the time when the contract should be completed the title should be made out and the money is ready, then the conveyance takes place. Now it has been suggested that when that takes place, or when a court of equity decrees specific performance of the contract, and the conveyance is made in pursuance of that decree, then by relation back the vendor has been trustee for the vendee from the time of the making of the contract. But again, with deference, it appears to me that if that were so, then the vendor would in all cases be trustee for the vendee of all the rents which have accrued due and which have been received by the vendor between the time of the making of the contract and the time of completion; but it seems to me that that is not the law. Therefore, I venture to say that I doubt whether it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other. They are only parties to a contract of sale and purchase, of which a court of equity will under certain circumstances decree a specific performance. But even if the vendor was a trustee for the vendee, it does not seem to me at all to follow that anything under the contract of insurance would pass. As I have said, the contract of insurance is a mere personal contract for the payment of money. It is not a contract which runs with the land. If it were, there ought to be a decree that upon the completion of the purchase the policy be handed over. But that is not the law. The contract of insurance does not run with the land; it is a mere personal contract, and unless it is assigned no suit or action can be maintained upon it except between the original parties to it. * * *

I therefore, with deference, think that the plaintiffs here cannot recover from the defendant on the ground that there was no relation of any kind or sort between the plaintiff and the defendant with regard to the policy, and therefore none with regard to any money received under the policy.

[An opinion concurring with that of BRETT, L. J., was rendered by COTTON, L. J.]

JAMES, L. J. — I am unable to concur in affirming the judgment of the master of the rolls. According to my view of the case the plaintiff's contention is founded not only on what I may call the natural equity which commends itself to the general sense of the lay world not instructed in legal principles, but also on artificial equity as it is understood and administered in our system of jurisprudence.

I am of opinion that the relation between the parties was truly and strictly that of trustee and *cestui que trust*. I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri* the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust estate. Wherever that state of things occurs, whether by act of the parties or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is a complete and perfect trust, the legal owner is and has been a trustee, and the beneficial owner is and has been a *cestui que trust*.

This being the relation between the parties, I hold it to be an universal rule of equity that any right which is vested in a trustee — any benefit which accrues to a trustee, from whatever source or under whatever circumstances, by reason of his legal ownership of the property — that right and that benefit he takes as trustee for the beneficial owner. If the policy of insurance in this case were a collateral contract, such as the policy which a creditor effects on the life of his debtor, the case would be wholly different. But the policy of fire insurance is not, in my opinion, a collateral contract; it is not a wagering contract, a contract that if a fire happens then a certain sum of money shall be paid to the insurer; it is in terms and in effect a contract that, if the property is injured, then the insurance company will make good the actual damage sustained by the property. That damage, and that damage only, gives the right and is the measure of the right, and it seems to me impossible to say

that it is not by reason of the legal ownership, and in respect solely of the injury done to that legal ownership, that the right to recover from the insurance company accrued to the insured. If the fire in this case had happened through the wrongful or negligent act of a third person while the contract was *in fieri*, the legal right to sue for the damage would be in the vendor, but on the completion of the contract the purchaser would be entitled to use the name of the vendor as his trustee to sue for the damage so sustained, or, if the damages had actually been recovered in the interval, to recover the damages from the vendor. And it appears to me that there is no distinction in principle between this right and the right to use the vendor's name in an action on the contract of indemnity against loss by fire which the policy of insurance is. It is not, in my view of the case, at all material to consider what would be the case if after actual conveyance and during the currency of the policy, a fire had occurred. The vendor in that case would have no right as between him and the insurance office, and the purchaser would have no right of action, because one of the conditions of the policy excludes it, and, independently of that condition, the policy would or might probably be held not to run with the land, in the hands of the subsequent owner, and in that case there would not be that which is the foundation of the right — legal ownership and right in one person, and equitable ownership in another.

No doubt it is a mere accident that there was such a policy and there was such a right. The vendor could not have complained if there had been no insurance. But that has occurred in a great variety of cases in which equitable rights have arisen. Where there is a creditor, a debtor, and a surety, and the surety finds out that by something to which he was not privy and of which he had never heard, somebody else had become surety, or the creditor had obtained security, the surety has a right to obtain contribution from such surety, or to obtain such security, as the case may be, and the creditor releasing such surety or parting with such security would probably find himself in considerable peril. * * *

¹ In *Ins. Co. v. Updegraff*, 21 Pa. St. 513, the vendor, after contract to sell and before conveyance, insured to the full value of the buildings; and after loss, which occurred before conveyance, the vendor Updegraff sued upon the policy for the use of the vendee. It was held that such insurance was "*prima facie* upon the whole legal and equitable estate, and not upon the balance of the purchase money," and that "the plaintiff was entitled to recover under a trust, as to the surplus, for the benefit of the vendee." The court says: "As the vendor is a trustee for the vendee, every act of his in relation to the estate will be presumed to be for the benefit of the vendee, subject, of course, to the prior

BRETT, L. J. — I should like to add to what I have said that I feel very great doubt whether, as between the defendants and the insurance company, the defendants can keep the money.

COTTON, L. J. — I quite concur in that doubt.¹

3. MORTGAGOR AND MORTGAGEE.

HARRIS, J., IN GROSVENOR *v.* ATLANTIC FIRE INS. CO.

17 N. Y. 391, 393. — 1858.

IN this case the contract was between the defendants and McCarty. The agreement was to insure Eugene W. McCarty against loss or damage by fire, to the amount of \$7,000, on his three story brick dwelling-house. But after the contract was made, and before the alleged loss, McCarty had sold and conveyed the property insured. At the time of the fire he had no insurable interest; of course, he has no claim for indemnity. No action, therefore, could be maintained upon the policy by McCarty. But at the time the insurance was effected the plaintiff in this action, Grosvenor, was the holder of a mortgage upon the premises insured. As such mortgagee, he, too, had an insurable interest. The extent of that interest was the amount of his debt. To that extent he might have contracted with the defendants to indemnify him against loss by fire. The payment of his debt would as completely terminate the contract to insure as would the alienation of the property, when the contract is made with the owner. The important inquiry in this case is, to which of these classes does the contract in question belong? The action is brought by the plaintiff as mortgagee. The contract was made with McCarty, the mortgagor. But the policy provides that in case of loss such loss should be payable to the plaintiff. What is the legal effect of this provision? Without it the plaintiff could have had no claim against the defendants for indemnity. Is this provision to be regarded as an appointment of the plaintiff to receive any money which might become due from the insurers by reason of any loss

claims of the vendor himself. This is reasonable because as the vendee must suffer the losses which may happen to the property; it is just that he should have the advantages of any benefits which accrue to it; and next to the security of his own interest a trustee will be presumed to have in view the interest of the *cestui que trust*."

¹ In *Castellain v. Preston*, 11 Q. B. D. 380, Castellain, representing the above insurance company, brought an action against the above defendant in respect of the money paid, and he was allowed to recover it. See *post* p. 536.

sustained by the mortgagor, or has it the effect to render the policy which would otherwise be a contract to indemnify the mortgagor against a loss, a contract to indemnify the mortgagee? A determination of this question will also determine the rights of the parties to this action. * * *

The undertaking to pay the plaintiff was an undertaking collateral to and dependent upon the principal undertaking to insure the mortgagor. The effect of it was that the defendants agreed that when ever any money should become due to the mortgagor upon the contract of insurance, they would, instead of paying it to the mortgagor himself, pay it to the plaintiff. The mortgagor must sustain a loss for which the insurers were liable, before the party appointed to receive the money would have a right to claim it. It is the damage sustained by the party insured, and not by the party appointed to receive payment, that is recoverable from the insurers. *Macomber v. The Cambridge Mutual Fire Ins. Co.*, 8 Cush., 133. The insurance being upon the interest of the mortgagor, and he having parted with that interest before the fire, no loss was sustained by him, and, of course, none was recoverable by his assignee or appointee. The right of such a party being wholly derivative, cannot exceed the right of the party under whom he claims. *Carpenter v. The Providence Washington Ins. Co.*, 16 Peters, 495; *Foster v. The Equitable Fire Ins. Co.*, 2 Gray, 216.

HASTINGS ET AL., EXECUTORS *v.* WESTCHESTER FIRE INSURANCE CO.

73 N. Y. 141. — 1878.

THE plaintiffs, as the surviving trustees and executors of the will of George Hastings, deceased, were on the 8th day of May, A. D. 1875, the owners of a bond and mortgage executed by Sarah C. Stout and Thomas H. Stout, her husband, for the sum of \$14,000; the mortgage covering premises in the village of Irvington, Westchester county, New York. Defendant, on said 8th day of May, 1875, issued to Mrs. Stout its policy of insurance for the sum of \$10,000, for a term of three years, on her dwelling-house, upon said mortgaged premises, which policy contains this clause: "Other insurance permitted." Also the following condition numbered nine: "In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured

bears to the whole amount insured thereon, whether such other insurance be by specific or by general or by floating policies." On September 1, 1876, with the consent of Mrs. Stout, and at the request of the plaintiffs, the defendant indorsed upon said policy the following words: "Loss, if any, payable to Maria L. and Eastburn Hastings, trustees and mortgagees," and at the same time annexed to said policy the following clause, known as the "mortgage clause:" "It is hereby specially agreed that this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy. It is also provided and agreed that the mortgagee shall notify the company of any change of ownership or increase of hazard not permitted by this policy to the mortgagor or owner as soon as the same shall come to his or her knowledge, and shall, on reasonable demand, pay the additional charge for the same, according to the established scale of rates, for the time such increased hazard may be or shall have been assumed by this company, during the continuance of this insurance. And it is further agreed that whenever the company shall pay the mortgagee any sum for loss under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, said company shall at once be legally subrogated to all the rights of the mortgagee under all the securities held as collateral to the mortgage debt, to the extent of such payment, but such subrogation shall not impair the right of the mortgagee to recover the full amount of his claim, or at its option said company may pay to the mortgagee the whole principal due or to grow due on the mortgage, with the interest then accrued, and shall thereupon receive a full assignment and transfer of the mortgage, and all other securities held as collateral to the mortgage debt.

GEO. R. CRAWFORD,
Secretary."

The policy was thereupon delivered to the plaintiffs. On the 20th day of October, 1876, said dwelling was destroyed by fire. Due notice of the loss was given, and proof of loss, as required by said policy, was made and delivered to said defendant on the 14th day of November, 1876, and arbitrators were on the 11th day of December, 1876, chosen to adjust the amount of loss, difference having arisen as to amount of such loss. On the 18th day of January, 1877, the amount of the loss and damages was adjusted at \$9,832.52. At the time of the issuing of the said policy, and of the indorsements and the

delivery of the same to the plaintiff, said Sarah C. Stout had obtained another policy of insurance upon the property in the amount of \$4,000, issued by the Lycoming Insurance Company, containing a clause as to the contribution in case of other insurance, the same as the one issued by the defendant, but the fact of such insurance was not known to either the plaintiffs or defendant until after the said fire, and the said policy was not payable to plaintiffs. The amount of the loss as adjusted, together with the value of the land covered by the mortgage, would not more than pay the plaintiffs the amount of their mortgage, and upon a foreclosure would not realize that amount. The plaintiffs claimed the whole amount of said loss as adjusted, \$9,832.52, with interest thereon from January 14, 1877, said date being sixty days after proof of loss, was delivered to the defendant. Defendant claimed that by reason of the insurance in the Lycoming Insurance Company it was only liable for ten-fourteenths of the loss; also, that under its policy the amount due was not payable until sixty days after the adjustment of the loss. The General Term sustained plaintiffs' claims.

RAPALLO, J. — By the terms of the mortgage clause attached to the policy the defendant agreed that the insurance, as to the interest of the mortgagee only, should not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than were permitted by the policy. But it was further agreed, in substance, that if the defendant should pay the mortgagee any loss, for which it would not be liable to the mortgagor, it should be subrogated to the rights of the mortgagee under all securities for the mortgage debt, or it might pay the amount due on the mortgage and take an assignment thereof. * * *

I think the intent of the clause was to make the policy operate as an insurance of the mortgagors and the mortgagees separately, and to give the mortgagees the same benefit as if they had taken out a separate policy free from the conditions imposed upon the owners, making the mortgagees responsible only for their own acts. It established a privity between the company and the mortgagees, and provided that, notwithstanding that the insurance might be invalidated as to the mortgagors, it should, nevertheless, protect the mortgagees; and, as a consideration for this undertaking, it was stipulated that, in case the company should be called upon to pay the mortgagees, under circumstances which discharged it from liability to the mortgagors, it should be indemnified by subrogation, or an assignment of the mortgage and all securities held by the mortgagees for the mortgaged debt. This provision, in case the

policy were invalidated as to the mortgagors, made it, in substance, an insurance solely of the interest of the mortgagees, by direct contract with them, unaffected by any questions which might exist between the company and the mortgagors. The same consequences would follow, *pro tanto*, from a partial, as from an entire invalidation, or a reduction of the policy as to the mortgagors.

There having been in the present case no additional insurance upon the interest of the mortgagees, which should reduce their claim to one for contribution, I do not think they are affected by the additional insurance on the interest of the mortgagors, even though it existed at the time of the issuing of the policy now in question, the mortgagees having been ignorant of, and having no interest in, such additional insurance. For whatever amount the defendant may have to pay the plaintiffs in excess of the sum which the mortgagors could have collected on the policy, were there no mortgage, the company is entitled to reimbursement, by enforcing the bond and the mortgage, to which it is entitled by subrogation to that extent; or it may pay them and take an assignment, in which case it would be bound to give credit thereon, only for its contributive share of the loss for which it is liable in respect of the interest of the mortgagors. If the security is insufficient to make the defendant whole for its excessive payment, that is no answer to the claim of the plaintiffs; it is a loss resulting from the contract of the defendant with the mortgagee.

The mortgagors derive no benefit from the sum paid by the defendant in excess of its contributive proportion. The mortgage debt is not reduced by that payment, but only to the extent of the contributive share for which the policy stood for the benefit of the mortgagors. The mortgagors remain liable on their bond for the amount payable thereon beyond this contributive share, in case the company takes an assignment. If the mortgaged premises should, on a foreclosure, prove insufficient to pay this excess, the mortgagors will be liable for the deficiency. They have their claim against the Lycoming Insurance Company for its contributive share of the loss which is identical in amount with the excess which the defendant is obliged to pay to the mortgagees. The Lycoming Insurance Company can claim no benefit from the payment by the defendant to the mortgagees. Whether the defendant can, for its indemnity, have any recourse against the proceeds of the policy in the Lycoming Company is a question not involved in the present case. The only question here is whether it can set up that insurance as against the claim of the mortgagees.

For the reasons stated I concur in the conclusion of my

learned brother Miller, J.,¹ * * * that the judgment should be affirmed.

All concur for affirmance, except ALLEN, FOLGER and ANDREWS, JJ., dissenting.

Judgment affirmed.

STONE, C. J., IN FIRE INSURANCE COMPANIES *v.*
FELRATH.

77 ALA. 194. — 1884.

Can Felrath maintain these actions in his own name? We think not for the following reasons: The policies were taken out in the name and in favor of James Clark, who owned the property. The gross sum of the policies was \$1,550. Felrath had a mortgage on the property, but the policies were neither assigned nor transferred to him so as to constitute them his property, nor to make him, Felrath, the party assured. The only interest Felrath had is shown on the face of the policies themselves and is expressed in this language: "Loss if any payable to Joseph Felrath, to the extent of his mortgage." * * *

It is contended for appellee that Felrath can maintain these actions under section 2890 of the Code of 1876, which provides that actions on contracts express or implied for the payment of money, must be prosecuted in the name of the party really interested, whether he has the legal title or not. This would undoubtedly be the case if by the terms of the policy or assignment pursuant to its terms, the entire sum of the insurance money had been made payable to Felrath. *Appleton Iron Co. v. Br. Amer. Assur. Co.*, 46 Wis. 23; *Keeler v. Niagara Falls Fire Ins. Co.*, 16 Wis. 523. We hold however that the right of action on this contract must be determined by the *status* of the transaction which the parties by their contract have fixed upon it. It is the contract itself and not any after occurring accident which determines the intention the parties had. They appointed the payment of part of the money to Felrath in case of loss. They did not appoint the payment of the entire sum nor were the policies assigned. They did not confer on Felrath a right to sue for a part and on Clark the right to sue for the residue. That would have been to split one contract into two causes of action which can only be done by agreement of debtor and creditor having that object in view. It was not done in this case; and the accident

¹ The opinion of the court was written by MILLER, J., but the briefer opinion by RAPALLO, J., has been chosen for publication here.

that the loss was only partial, and did not exceed the sum appointed to be paid to Felrath, can neither change the contract relations of the parties nor affect an assignment of the policies. There are a few cases which it is contended hold the contrary of these views, but if they do we decline to follow them. *N. W. Mut. Life Ins. Co. v. Germania Fire Ins. Co.*, 40 Wis. 446; *Hammel v. Queen Ins. Co.*, 50 Wis. 240; s. c., 41 Am. Rep. 1; *State Ins. Co. v. Maackens*, 38 N. J. Law, 564. In some of these cases the appointee's claim equalled or exceeded the whole sum insured, which of course involved no splitting up of the cause of action. This distinguishes such cases from this. *Watertown Fire Ins. Co. v. Sewing Machine Co.*, 41 Mich. 131.

MILLER *v.* ALDRICH.

31 MICH. 408. — 1875.

COOLEY, J.—The following facts we think are established by the evidence in this case: Miller, the complainant, on the eighth day of August, 1871, became surety for Alpheus O. Chapman, on a note for three hundred dollars to Edward Paine, payable in two years from date with ten per cent. interest. To secure him for doing so, Chapman orally agreed to give him a mortgage on a certain house and lot, and as the lot without the house was of little value, he also agreed to keep the house insured for Miller's benefit. This agreement was carried into effect so far as the giving of the mortgage was concerned, and a policy of insurance was also taken out for the sum of one thousand dollars, loss if any payable to Miller to the extent of his interest, but terminating August 19th, 1872. On the fourteenth day of March, 1872, Chapman sold the mortgaged premises to the defendant Aldrich, subject to this mortgage, and on an oral understanding that Aldrich should perform its condition. Instead, however, of having the insurance policy assigned to Aldrich, it was surrendered, and a new one taken out in the name of Aldrich, and without providing in terms for the protection of Miller. This insurance was for eight hundred dollars, which was quite as much as the value of the building would justify. Miller, when he was informed what had been done, called upon Aldrich, and expressed apprehension about his security, but Aldrich quieted him by assuring him that in event of loss he should be protected by the insurance money. The building was actually destroyed by fire in the December following, and the loss has been adjusted and is ready to be paid over, but Aldrich now refuses to apply any portion of the money to the protection of Miller. The purpose of this suit

is to compel the application, and the Circuit Court has decreed that the insurance moneys, to the amount of the Paine note, shall be paid into court to be paid over to Miller on his discharging his mortgage.

In the main we think the decree correct. Though Chapman may have a legal right to surrender the policy he had taken out for Miller's protection, he had no equitable right to do so; and as Aldrich knew all the facts, and took his new policy on a wrongful surrender of the one which protected Miller, and for a sum which precluded Miller from insuring on his own behalf, we think Miller must be held to have an equitable interest in the new policy to the extent of his lien, whether Aldrich did or did not expressly agree with Chapman that such should be the case, as the latter says he did. The case is within the principle of *Cromwell v. Brooklyn Ins. Co.*, 44 N. Y. 42, and it is not important whether Chapman had or had not legally bound himself to Miller to keep up insurance for his benefit, when by virtue of the oral understanding he had actually executed such insurance.

It is objected that Chapman should have been made a party to the suit, but we discover no necessity for it. The decree will incidentally protect him, and he might doubtless have been joined; but complete justice is done to all parties concerned, when complainant obtains the relief prayed for. Complainant's case is, that Chapman is wholly insolvent, so that the complainant has no resource but this insurance money for his indemnity; and defendant certainly has no interest in having Chapman made a party, as in no contingency could he be entitled to any relief as against Chapman, and his satisfaction of complainant's equity will at the same time satisfy any equity of Chapman based on his oral promise to pay off this claim.

It is also objected that the decree is erroneous, inasmuch as it provides that insurance money to the amount of the Paine note shall be paid to complainant when the mortgage is discharged, though this may be done leaving the note outstanding. This was probably an inadvertence in drafting the decree, and the decree should be so modified as to make the payment of the insurance money secure the surrender or satisfaction of the note, together with satisfaction of the mortgage. We cannot say that the error was immaterial to Aldrich, as, under the agreement between Chapman and himself when the sale took place, the former would doubtless have a lien on the land for his protection in case the note was not met when due and should be taken up by himself. Under the circumstances, while modifying the decree as suggested, and affirming it in all other respects, no costs will be awarded in this court.

WALKER, J., IN NORWICH FIRE INS. CO. v. BOOMER.

52 ILL. 442, 446. — 1869.

It is again urged that, inasmuch as the mortgagors paid the debt to appellee [mortgagee] before the recovery in the court below, and the mortgagee has sustained no loss, he is not entitled to recover. Had appellants paid this loss before the mortgagors paid the debt to appellee, then the question of their right to subrogation would have been presented for consideration; but, inasmuch as appellants had not done so, the questions presented are of a different character. Had appellee applied for the policy, paid the premium, and effected the insurance, and on the occurrence of this fire appellants had paid the loss, they would no doubt have been entitled to subrogation, by an assignment of the mortgage. In such a case, the insurance would be considered as a further security of the debt, and on the familiar principle that a surety who pays the debt may resort to the principal debtor for payment; in such a case the insurer might, no doubt, resort to the mortgagor for payment.

But in this case the mortgagors paid the premium, and obtained the policy, in pursuance to an agreement with the mortgagee before it was effected. The mortgagors procured it as a part of the security they agreed to give appellee for the debt they owed him. It was, then, in equity, their policy, and not appellee's, although in his name. Had the mortgagors paid the premium, and obtained the policy in their names, the question could not have arisen. Then why, when they, in pursuance of their agreement, pay the premium, should they not be regarded as the beneficial assured, when they shall have paid the debt and released the property? In such a case they seem to have strong equitable, as well as legal, claims to pay for the loss, and should be permitted to use the name of the mortgagee to recover. Had they taken this policy in their own names, with the loss payable to appellee, according to his interest, and they had subsequently paid the debt, no one, we presume, would question their right to sue in the name of the mortgagee, and recover for their own use. We understand it to be the settled law that, when the mortgagor or pledgor insures the property, and a loss occurs, he may recover because he has an insurable interest in the property, and reason and justice require that when he pays the premium, although he insures in the name of the incumbrancer, and he afterwards pays the debt, he should be permitted to recover for loss to the property. And this rule is supported by the authorities. *King v. The State Mutual Fire Insurance Co.*, 7 Cush. 1; *Concord Union Mutual Fire Insurance Co. v. Woodbury*, 45 Me. 447; *Kernochan v*

The New York Fire Insurance Co., 17 N. Y. R. 428. The first of these cases, however, goes further, and holds that the mortgagee may insure, and, in case of loss, may collect his debt and recover on the policy; and the insurer has no right to subrogation. But these latter propositions are not in harmony with the current of the authorities, but the opinion sustains the rule we have announced.

AMOUNT OF MORTGAGEE'S RECOVERY. — "It is not a defense to the insurer that the debtor is solvent and that the insured may make good his personal claim against him. The insured is not bound to exhaust his remedies against third parties before claiming indemnity from his insurer. *Collingridge v. Royal Exch. Asso.*, 3 Q. B. D. 173; *Hancox v. Fishing Ins. Co.*, 3 Sumner, 132. It has not been decided in this country [England] whether it is a valid defense that the security, although diminished in value by the fire, is still sufficient to cover the mortgage debt, and the American authorities upon the question are not unanimous. In the leading case the defense was rejected, and it was held that a mortgagee who has insured his separate interest is entitled, upon assigning his mortgage to his insurer, to claim the full amount insured wherever the security has been materially damaged by fire. The ground of judgment was that the insured is not bound to resort elsewhere than to his policy for indemnity, and that this principle, recognized as regards the mortgagee's personal claim against the debtor, is equally applicable to his remedy upon the mortgaged property. *Excelsior Fire Ins. Co. v. Royal Ins. Co. of Liverpool*, (55 N. Y. 343), 14 Am. R. 271, where all the authorities are reviewed, pp. 279, 283. The competing theory is that a mortgagee insures not the ultimate safety of the whole property, but its capacity to pay the mortgage debt, and that he can only claim under his policy the balance of his debt which his security remaining after the fire is insufficient to cover. As a consequence of this view it was held that, where insurance is effected by a mortgagee upon his special interest, the existence of prior incumbrances is material to the risk and must be disclosed. *Smith v. Columbia Ins. Co.*, (17 Pa. St. 256), 55 Am. D. 546; *Carpenter v. Prov. Ins. Co.*, 16 Peters, 495; 2 Am. L. Cas. 865. The two theories may be illustrated by the following case. Suppose that property of the value of £1,000 is mortgaged to A for £500 and to B for £500, and that A and B insure in respect of their mortgage interests to the full amount of their debts. Suppose that the security is injured by fire to the extent of £500. If A's mortgage be prior to B's, A's insurer upon the theory last explained

would not be liable to him, because the value of the security is still sufficient, if realized, to pay his debt. B's insurer upon the same theory would be liable to him for £500 because his debt is wholly uncovered. On the first theory A and B would each be entitled to claim the whole sums insured, because A's security is less valuable by its margin of £500 than it was before the fire, while B's debt is, as before, entirely uncovered, A's insurer having been subrogated to A's preferable rights upon the security. Upon either theory the actual loss of £500 is ultimately made good by the insurer of the postponed creditor." — Wm. Harvey on "Insurance of Limited Interests," in 10 *Law Quar. Rev.* 48.¹

b. Life Insurance.

1. WHO MAY BE A BENEFICIARY.

LANGDON v. UNION MUTUAL LIFE INS. CO.

14 FED. 272 (CIRCUIT CT. E. D. MICH.) — 1882.

THIS was an action upon a policy of life insurance upon the life of Augustus E. Baker, "for the sole and separate use and benefit of his brother-in-law, William W. Langdon. But in case of his previous death to revert to the insured." The facts in relation to this policy were substantially as follows: The agent of the defendant solicited Langdon, the plaintiff, to insure his life in his company. This application plaintiff declined, but said to the agent that he might go to his brother-in-law, Baker, and get him to make

¹ Professor McClain, in an article on "Insurance of Limited Interests," (11 *Har. L. Rev.* 512), concludes that "Briefly, the obligation to make indemnity may be indicated as follows: 1. Fire insurance is a contract of indemnity against damages to the insured by reason of loss or injury to the property by fire. 2. The recovery for a loss should not exceed the damage, certain or contingent, which insured has suffered, or may suffer, by reason of the loss. 3. If the interest of the insured is that of ultimate owner, with a limitation in the nature of a lien to secure his indebtedness, he is entitled to full indemnity for loss of, or injury to, the property to the extent of the insurance, for the loss falls upon him. If his interest is that of a lienholder, his recovery should be for the amount of his lien. 4. In case of a lienholder, bailee, or other person having a contingent or temporary interest, the doctrine of indemnity leads to subrogation, and perhaps to a right to recover from insured any amount paid beyond the damage which subsequently appears to have been suffered. 5. The right of subrogation is not a primary right of insurer, but arises only as between himself and insured to prevent the ultimate realization by the insured of more than full indemnity."

an application for a policy, and the plaintiff would pay the premiums. Baker was the plaintiff's brother-in-law, but he had no other interest in his life. The court left it to the jury to say whether the policy was taken out in good faith by Baker, with a designation of the plaintiff as a person to receive the money, or whether it was intended by the plaintiff as a wagering contract upon Baker's life. The jury returned a verdict for the amount of the policy. Motion was made for a new trial upon the ground of misdirection upon this and other points stated in the opinion.

BROWN, D. J. — The policy in this case purported upon its face to be taken out by the insured upon his own life, but the evidence shows that it was taken at the suggestion of his brother-in-law, who sent the agent of the company to Baker, and paid all the premiums upon the policy. It was made payable to the plaintiff in case he survived Baker. Baker's life had previously been insured in other companies for plaintiff's benefit to the amount of \$6,000. He had also made application to the Massachusetts Mutual Life Insurance Company for a policy of \$3,000, which was rejected. Upon the trial, the question was left to the jury to say whether the policy was obtained in good faith, and not for the purpose of speculation in the hazard of a life in which the plaintiff had no legal interest. It was thought that the fact that the policy provided in express terms that in case of the previous death of the plaintiff it should revert to the insured, and hence that the plaintiff's interest was contingent upon his surviving Baker, was some evidence to go to the jury that the policy was taken out in good faith. It was certainly consistent with an understanding that the plaintiff wished to hold the policy during his life as security for the premiums, with a resulting trust in favor of Baker's wife, who was his own sister.

It is now well settled in the federal courts that a party cannot take out an insurance upon his own life and assign the policy, either contemporaneously with its execution or subsequently, to a person having no legal interest in his life, although the decisions of the State courts upon this point are conflicting. *Warnock v. Davis*, 104 U. S. 775; *Cammack v. Lewis*, 15 Wall. 643. But there is no case, to my knowledge, which holds that a party may not insure his own life and make the policy payable to any one he may select, though such person have no legal interest in his life. This point was first held in the case of *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381. The policy in this case was taken out by Campbell upon his life, payable to him, his executors, etc., for the benefit of the plaintiff, in very nearly the same terms as are contained in the policy under consideration. The only substantial difference in the two

cases is that the premium in this case was paid by the assured, and not by the beneficiary. So in the *Provident Life Ins. Co. v. Baum*, 29 Ind. 236, it was said to be "beyond question that a person has an insurable interest in his own life, and that he may effect such insurance, and appoint any one to receive the money, in case of his death during the existence of such a policy." This was an accident policy in similar terms. Although this exact question has not often been decided, the intimations of the courts are uniformly in the same direction. *Lemon v. Phenix Mut. Life Ins. Co.*, 38 Conn. 294, 302; *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35; *American L. & H. Ins. Co. v. Robertshaw*, 26 Pa. St. 189; *Fairfield v. N. E. Mut. Life Ass'n*, 51 Vt. 624; *Olmstead v. Keyes*, 11 Ins. Law J. 55.

Hence, the production of the policy, proof of payment of premiums, and of the insured's death, were sufficient to make a *prima facie* case for the plaintiff without evidence of interest in him. The facts, however, that the policy was taken out by Baker at the plaintiff's instigation, and that the premiums were paid by plaintiff, taken in connection with Baker's position in life, his total want of means, and the further fact that the plaintiff had obtained policies upon his life to the amount of \$6,000 in addition to this, were strong evidence to show that the transaction was a mere wager upon his life, notwithstanding the fact of Baker's reversionary interest. The case was submitted to the jury in supposed conformity to the opinion of the Supreme Court in *Conn. Mutual Life Ins. Co. v. Shaffer*, 94 U. S. 67. See, also, *Etna Life Ins. Co. v. France*, Id. 561; *Brockway v. Mut. Benefit Life Ins. Co.*, 10 Ins. Law J. 763-769, *Wainwright v. Bland*, 1 Moody & R. 481; *Swick v. Home Life Ins. Co.*, 2 Dill. 160. The mere payment of the premiums by plaintiff is not conclusive evidence that the policy was taken out by him. *Tuston v. Hardey*, 14 Beav. 232; *Armstrong v. Mut. Life Ins. Co.*, 13 Reporter, 711. Were it an original question, I should be disposed to say that a policy taken out by one person for the benefit of another could no more be supported without evidence of legal interest in the beneficiary, than a policy assigned to one having no interest in the life. But a large number of cases seem to make this distinction, and I know of none which reject it. Under all the circumstances, I think the question was properly submitted to the jury. * * *

¹ See also, in accord, *Bloomington Mut. Ben. Assoc. v. Blue*, 120 Ill. 121.

In *Trinity College v. Ins. Co.*, 113 N. C. 244, Sheppe insured his life, making Trinity College the beneficiary. The beneficiary paid all the premiums, but had no insurable interest in Sheppe's life. The beneficiary sued to recover the

2. NATURE OF THE BENEFICIARY'S INTEREST.

HARLEY, ADM'R *v.* HEIST

86 IND. 196. — 1882.

ZOLLARS, J. — The record in this case presents in different forms the following material facts: On the 1st day of February, 1867, in consideration of the payment of a premium of \$70.20 by David Snyder, and the same amount thereafter to be paid annually, the Connecticut Mutual Life Insurance Company executed and delivered to said David Snyder a policy of insurance upon his life, in which it agreed to pay \$2,000 upon due proof of his death. That portion of the policy which is material to the parties in this controversy is as follows: "And the said company do hereby promise and agree with the said assured, his heirs, executors, administrators and assigns, well and truly to pay, or cause to be paid, at the city of Hartford, the said sum insured to the said assured, his executors, administrators or assigns, within ninety days after due notice and proof of the death of the said David Snyder, for the benefit of and payable to Wilhelmina R. Snyder, wife of said David Snyder, deducting therefrom all notes taken for premiums unpaid at that date. And it is hereby conditioned and agreed, that if at any time after three premiums have been paid on this policy, it shall be surrendered while yet in force, the company will issue a paid-up, non-forfeiture policy therefor, for such an amount as the then present value of this policy would purchase, as a single premium." The wife Wilhelmina, died intestate in December, 1869, and left surviving her, her husband, David, and their two minor children. On the 20th day of February, 1871, said David Snyder, being indebted to appellee, assigned the policy to him by endorsing upon it the following:

"COLUMBIA CITY, *February 20th*, 1871.

"For value received, I herewith assign my interest to the within policy to Henry Heist.

DAVID SNYDER."

In the month of November, 1874, David Snyder died intestate. Up to the time of the assignment and delivery of the policy to appellee, said David Snyder paid the premiums as stipulated for in the policy. After the assignment, appellee paid the premiums, viz.:

cash surrender value of the policy, there being a provision in the policy for surrendering the policy. The complaint was demurred to and the demurrer sustained; the court saying that the policy was "illegal and void" as a wagering contract.

On the 24th day of January, 1872, \$48 70; on the 24th day of January, 1873, \$46.20; and on the 24th day of January, 1874, \$46 55. In 1875, after appellant had been appointed administrator of the estate of said Wilhelmina, the insurance company filed its complaint in the Whitley Circuit Court against the parties in this cause, asking that they be required to set up their respective claims to the policy and the money due thereon. After appellee had filed his answer and cross-complaint, the insurance company, by agreement of the parties, and an order of the court, paid to the clerk \$1,909.73, being the amount due on the policy, less an unpaid premium note, and interest on the same, amounting in all to \$127.68. We are not informed by whom this note was executed.

After this, the venue was changed to the Kosciusko Circuit Court. In that court appellant filed his answer and cross-complaint, to each paragraph of which, except the general denial, a demurrer by appellee was sustained, and appellant excepted. The cause was then submitted to the court, and after the finding of facts, and conclusions of law on the same, a judgment was rendered, giving to appellee the full amount of money so paid over by the insurance company, the same not exceeding the amount of the premiums paid by him, with interest, and the amount due him from Snyder for which the policy was assigned. From this judgment appellee appeals.

Was the policy the personal property of the wife Wilhelmina in such a sense that, upon her death, it went to her heirs at law as a part of her estate, or was it upon her death the property of the husband, so that his assignment transferred the legal title to the same to appellee? This is the important question presented by the record, the determination of which, counsel agree, will be decisive of this controversy. That the policy was personal property, under our statute (2 R. S. 1876, p. 314), we think there can be no question. In consideration of the payment of the annual premiums, it contained a definite and fixed promise to pay a definite and fixed amount of money, upon the happening of an event, which was uncertain in nothing except the time at which it might occur. Such a policy of insurance is a chose in action, governed by the same principles applicable to other agreements involving pecuniary obligations. Bliss, *Life Insurance* (2d ed.), p. 540; *Hutson v. Merrifield*, 51 Ind. 24, 19 Am. R. 722.

The policy in this case, by its terms, was executed for the benefit of the wife, and, upon a fair construction, was payable to her, and not to the personal representatives of the husband. Upon its execution, the title vested in the wife, and not in the husband. By the procurement of the husband, the wife became the owner of the

policy and entitled to collect the amount that might become due on the same upon the death of the husband. Had the wife procured the policy to be issued, and paid the premiums, no one could doubt as to the ownership of the policy, and the right to collect the money due thereon. We are unable to see, in this case, why there should be any difference in the ownership and title of the policy by reason of the application having been made and premiums paid by the husband. Had the policy been made payable to the husband, he doubtless might have given it to the wife, and, by proper indorsements thereon, conveyed to her the legal title to the same. In such a case it would have become her separate property, by gift from her husband; and so, too, he had the legal right, in the first instance, to make the application, pay the premiums, and have the policy made payable to the wife for her benefit, and thus vest in her the legal title and ownership of the policy, as her separate property. The title and ownership of the policy being vested in the wife by gift from the husband, it was her separate property, to be disposed of under the statute, which provides that the personal property of the wife, acquired during coverture, by descent, devise, or *gift*, shall remain her own separate property, to the same extent and under the same rules as her real estate so remains, and, on her death before the husband, shall be distributed in the same manner as her real estate descends, and is apportioned under the same circumstances. 1 R. S. 1876, p. 412; R. S. 1881, sec. 2488.

Personal property thus acquired by the wife, upon her death, descends to her heirs at law, as does her real estate, except for the purpose of paying debts and costs of administration, the title vests in the administrator, if one be appointed. In this case the policy of insurance, upon the death of the wife Wilhelmina, descended to her heirs at law; the undivided one-third to the husband, David Snyder, and the other two-thirds to the minor children, subject to the rights of the appellant, as the administrator of her estate, who, for the purpose of paying debts and costs of administration, has the right to collect the money due upon the policy, to the exclusion of all others. If there had been no need of administration, and no administrator had been appointed, the heirs at law of the wife might have collected the money. Subject to this right of the administrator, the husband had the legal right to assign his interest in the policy, as he did, to the appellee. Upon such assignment appellee became the owner of, and entitled on distribution to, one-third of the amount due upon the policy, after the payment of debts and costs of administration.

We have carefully examined the cases cited by the learned coun-

sel on either side, besides many others, and, while there is some conflict, the conclusions reached by us in this case are in accord with the decided weight of the authorities. In the case of *Hutson v. Merrifield*, 51 Ind. 24, the contest was between the administrator of the husband and the surviving wife. The wife had taken out a policy upon the life of the husband, payable to herself, or in case of her death, to her children. The premiums were paid by the wife. She died before the husband and without children. The case was disposed of as though the policy had contained no clause in relation to children. After deciding that the policy was a chose in action, the court say: "If the policy is a chose in action, it is personal property which at the death of the party holding and owning it would vest in the heirs of such person, subject to the payment of debts. That the amount of the policy is not payable until the death of the life insured, can make no difference."

In the case of *Pence v. Makepiece*, 65 Ind. 345, the question arose between the administrator of the assignee of a policy of life insurance, and the widow of the insured. The husband had procured a policy of insurance upon his life, payable to his wife, and paid the premiums. During the lifetime of the husband the policy was assigned as collateral security, and the assignee, before the death of the husband, paid three annual premiums. After the death of the husband, and on the trial of the cause in relation to the money due on the policy, the wife denied that she joined with her husband in the assignment of the policy. The court below had instructed the jury that the policy, being payable to the wife, vested in her alone the absolute ownership of it, and that it could not be assigned or transferred to any one by her husband, or any other person, without her authority. This instruction was held by this court to express the law correctly. See, to the same effect, *Wilburn v. Wilburn*, 83 Ind. 55, and authorities cited. In *Bliss on Life Insurance* (2d ed.), § 318, the author says: "We apprehend the general rule to be that a policy, and the money to become due under it, belong the moment it is issued to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named. An irrevocable trust is created. * * * The legal representatives of the insured have no claim upon the money, and cannot maintain an action therefor, if it is expressed to be for the benefit of some one else."

In the case of *Keller v. Gaylor*, 40 Conn. 343, a husband had taken a policy upon the life of his wife, payable to himself, or, in case of

his death before the wife, to his children. He died before the wife, and without children. Held, that at his death he had a vested interest in the policy, and that, by his will, it went to the wife. See, also, *Chapin v. Fellowes*, 36 Conn. 132, 5 Am. R. 49; *Crittenden v. Phoenix Mutual Life Ins. Co.*, 41 Mich. 442; *Connecticut Mutual Life Ins. Co. v. Burroughs*, 34 Conn. 305; *Ruppert v. Union Mutual Ins. Co.*, 7 Rob. (N. Y.) 155.

It is maintained by the learned counsel for appellee, that Snyder, having paid the premium, had the right, after the death of the wife, to omit the payment and thus let the policy forfeit; and that, to avoid this loss, he had the right to change the beneficiary, or constitute himself such, by the assignment. If the policy was personal property, and the title thereto was vested in the wife, we are unable to understand how the husband, by any act of his, without the consent of the beneficiary, could change the ownership. The property, under the statute, passed at once upon the death of the wife to her heirs at law, and the husband had no more control over it than before her death. True, he could not have been compelled to pay the premiums, or provide for the payment, but having paid them by himself and his assignee, the policy did not lapse, and the title to and ownership of the same did not change.

In the same edition of Bliss above quoted from, section 337, the author says: "Where the policy designates a person to whom the insurance money is to be paid, the person who procures the insurance and who continues to pay the premiums has no authority, by will or deed, to change the designation or title to the moneys. He is under no obligation to continue to pay the premiums, unless he has covenanted so to do, but if he does so, the person originally designated in the policy will derive the benefit. The change of designation can only be made by the person originally designated, and therefore all of such persons must concur in the change. If the policy is for the benefit of a woman and her children, the children as well as the woman must concur." In the case of *Chapin v. Fellowes*, 36 Conn. 132, a policy was issued upon the life of the husband, payable to the wife; or, in case of her death, to her children. The wife died before the husband. After her death the husband surrendered the policy and took another for the same amount, the same date, and the same premium, but payable to himself. He paid one year's premium, and died insolvent. In a contest between the children and the husband's creditors, it was held that the husband had no right without the consent of the children thus to surrender the old policy and take the new one, payable to himself; and that the children were entitled to the amount due on the latter

policy. In the case of *Ricker v. Charter Oak Life Ins. Co.*, 27 Minn. 193, 38 Am. R. 289, the husband had procured a policy of insurance upon his life, payable to his wife, or in case of her death, to his children. After the death of the wife, and a remarriage, he surrendered the original policy, and a new one was issued in its place as a substitute therefor, bearing the same date and containing the same terms and conditions, except a provision that it should inure to the sole use and separate benefit of the second wife. Held, that the husband had no right to thus change the policy without the consent of the children, and that they were entitled to the avails of the new policy as against the second wife. It is said by counsel that these decisions were made under peculiar statutes, and are therefore not authority in this State. It will be found upon examination that these statutes, where they exist, give to married women no greater rights in policies or the avails of policies, upon the lives of their husbands, than they have under the laws of this State, except that, in some of the States, no claim of fraud can be made by creditors if the annual premiums paid by the husband do not exceed certain amounts.

It is said further, that to deny to the husband who has paid the premiums the right to dispose of the policy to his own use, after the death of the wife, imposes upon him a hardship and wrong. A sufficient answer to this is, that if he wishes to retain to himself the control and ownership of the policy in such case, he may so provide in the policy. It was to avoid this so-called wrong, that the Wisconsin court has held that the person procuring the policy may dispose of it without the consent of his nominee. Such a view, we think, is not consistent with legal principles, is in conflict with former rulings of this court, and against the weight of the authorities in the other States.

The appellee, having in good faith paid the premiums since the assignment of the policy, is entitled to have the amount so paid, with interest at six per cent., refunded to him out of the money paid over by the insurance company. It follows from the conclusion we have reached, that the court below was in error in rendering judgment for appellee, and in its rulings upon demurrers to pleadings. The judgment is therefore reversed, at the costs of appellee, with instructions to the court below to overrule appellee's demurrers to the first, second, fourth, fifth, and sixth paragraphs of appellant's answer and cross-complaint, to sustain the demurrer to appellee's answer and cross-complaint, and to proceed in accordance with this opinion.¹

¹ In *Pingrey v. Ins. Co.*, 144 Mass. 374, an insurance company issued a policy of insurance on the life of Pingrey, payable to him as soon as the premiums, together with such other sums as he should pay, should amount to the sum

RYAN v. ROTHWEILER ET AL.

50 OHIO, 595 — 1893.

ON the 19th day of March, 1864, the Home Life Insurance Company executed its policy of that date, and thereby insured the life of Charles C. Helwig in the sum of \$2,000, in consideration of a premium of \$72.20, to be paid on or before the 19th day of March of each year during the life of said Charles C. Helwig. The policy was made payable to Anna Helwig, wife of the assured, and in case of her death during the lifetime of her husband the policy was made payable to her children by her said husband, to their use, or to their guardian, if under age. Anna Helwig died November 21, 1872, leaving an only child, Anna C. Helwig, who was afterward married to Charles T. Ryan, and she died on the 29th day of December, 1881, leaving an only child, Raymond C. Ryan, who died on the 21st day of September, 1883. Charles C. Helwig died in the month of September, 1885, leaving two daughters by a former wife surviving him. Their names are Caroline Salome Ketter and Maria Rosina Scherman. Jacob Rothweiler was duly appointed administrator of the estate of Charles C. Helwig, deceased, and Charles T. Ryan was duly appointed administrator of the estate of his wife, and also of his infant son. Notice of the death of Charles C. Helwig having been given to the life insurance company, and the company failing to pay the policy, an action was commenced by the administrator of

insured. In case of his prior death the company agreed with him to pay the sum insured to his mother. The policy further provided, that, after the payment of two full premiums, it should not lapse. His intention was to make the policy for the benefit of his mother, who furnished him with money to pay part of the first premium. The mother never had possession of the policy. He subsequently married, and, without his mother's assent, surrendered the policy to the company, and took out a new one for the same amount payable to his wife. This policy contained the statement that it was a continuation of the first policy. He died before his payments amounted to the sum insured. It was held, that the first policy was a settlement in trust for the benefit of the mother, which he could not revoke; and that the mother was entitled to the proceeds. The court said: "There appears to have been a full understanding between him and his mother that the policy was to be taken out for her benefit, and afterwards that it had been so done. In point of fact, it was made payable to her, and this was done with the intention of giving to her the benefit of it. This constituted a valid settlement in her favor. Nothing remained to be done by him to complete it. He might, indeed, afterwards fail to pay the annual premiums. This, however, does not prevent it from being a good trust. An unrevoked trust is valid, even though there is an express power of revocation. *Stone v. Hackett*, 12 Gray, 227. In this case the assured reserved to himself no power of revocation, or of changing the beneficiary."

See also *Olmstead v. Keyes*, 85 N. Y. 593, digested in *Steinback v. Diepenbrock*, *post*, p. 404.

Charles C. Helwig and by his two surviving daughters against the insurance company, and said Charles T. Ryan was made a defendant, and required to set up his interest in the policy. The insurance company paid the money into court, and was discharged. Charles T. Ryan filed his answer and cross-petition, averring that he had been appointed administrator of the estate of his wife and of his infant child, and claiming the insurance money as such administrator. The plaintiff below demurred to Ryan's answer and cross-petition on the ground that the same does not state facts sufficient to entitle him to the insurance money. The Court of Common Pleas overruled the demurrer; to which exceptions were taken, and, plaintiffs below not desiring to further plead, judgment was rendered in favor of said Charles T. Ryan as such administrator. A petition in error was filed in the Circuit Court, and the judgment of the Court of Common Pleas was reversed. Thereupon, Charles T. Ryan filed his petition in error in this court for the purpose of reversing the judgment of reversal of the Circuit Court.

BURKET, J. — The petition avers that the premium was paid by Charles C. Helwig, and this is not denied by Charles T. Ryan in his answer and cross-petition. True, he avers, in the language of the policy, that the first premium was in hand paid by the wife, and that the subsequent premiums were to be paid, without stating by whom the payments were to be made. The fact that Charles C. Helwig survived his wife and daughter and grandson, and that no averment is made in the cross-petition as to the payment of the premium, during all the years from 1864 to 1885, and the further fact that the allegation in the petition to the effect that the premiums were to be paid by the assured is not denied, further than by a recital of the contents of the policy, leaves the fact reasonably certain that the premiums were paid by the assured, Charles C. Helwig. In fact, no other conclusion can be reached from a careful reading of the petition and cross-petition, regard being had to the order in which the parties died; and the arguments of counsel on both sides seem to concede the fact so to be. On the part of Charles T. Ryan, it is claimed that, by the terms of the policy, Mrs. Helwig, and, after her death, her daughter, Anna Ryan, had a vested interest in the amount to be paid, which could not be divested by any act of the husband or the insurance company, or both; that this vested right was a chose in action, — a simple contract to pay her (Anna Ryan) a certain sum of money on the happening of an event certain; that upon her death the chose in action passed to her administrator, to be collected when due, and the proceeds distributed to her next of kin. On the part of the defendants in error,

it is claimed that this insurance policy is a kind of trust, and that when the beneficiaries of the trust fund died the fund lapsed into the estate of the person who created the trust, and at his death became a part of his estate, subject to administration and bequest as other parts of his personal estate. Many authorities have been cited by the attorneys on both sides to support these propositions, and the Circuit Court well said that "there is admitted confusion among the reported cases and authors upon the subject." The question has never been decided in this State, and hence, we are at liberty to adopt such rule as we think is most consistent with justice, and the intention of the parties. The question is not governed so much by the principles of choses in action and vested rights as by the principles, aims, and well-known objects of life insurance. The cases which hold the insurance money to be a trust fund, which reverts to the estate of the assured in case of the death of all the named beneficiaries during the lifetime of the assured, give different reasons for the result arrived at. Some place it upon the ground that the person to whom the fund would otherwise go has no insurable interest in the life of the assured, while others place it upon the doctrine of failure of trust by the death of the beneficiary.

In the case now under consideration, should plaintiff in error succeed, he would receive the insurance money, while he manifestly had no insurable interest in the life of Mr. Helwig. While Anna C. Ryan had an insurable interest in the life of her father, her administrator had no such interest. While a man may cause his own life to be insured for the benefit of a stranger, and the want of insurable interest in the stranger will not invalidate the policy, a policy taken out by a man, for his own benefit, on the life of a stranger, would be void, for want of insurable interest. May, Ins. § 75b. The theory of a failure of trust comes with more force and stronger reasons than the doctrine of choses in action, so strongly urged by counsel for plaintiff in error. We regard the doctrine of choses in action as not fully applicable, because it conflicts in many cases with the controlling doctrine of insurable interest. The case of *Manhattan Insurance Co. v. Smith*, 44 Ohio St. 156, 5 N. E. 417, was a case of attempted change of beneficiary, and of forfeiture of policy. No such questions arise in this case. Here the question is not as to change of beneficiary, but as to reverter of the policy to the assured by reason of the death of all the beneficiaries. Hence, that case throws no light upon the question here involved. On principle, therefore, and aside from any statute on the subject, we think that in this case the policy reverted to Mr. Helwig, and at his death became a part of his estate. It seems to us that this was the mani-

fest intention and understanding of all the parties interested, and that the result is just and equitable. While there may have been a vested interest, it was an interest not in possession, but in expectancy, liable to be divested by the death of the beneficiary before the death of the assured. * * *

LYON, J., IN *FOSTER v. GILE*.

50 WIS. 603, 605. — 1880.

IT was held in *Clark v. Durand*, 12 Wis. 223, and again in *Kerman v. Howard*, 23 Wis. 108, that a person who procures a policy of insurance on his own life for the benefit of another, and pays the premiums thereon, may dispose of it, by will or otherwise, to the exclusion of the beneficiary named in the policy. The opposite doctrine was held in a very late case in Minnesota, *Ricker v. Charter Oak Life Ins. Co.*, [27 Minn. 193] 6 N. W. Rep. 771, and the opinion of the court seems to be fortified with authorities. However, until the Legislature enacts otherwise, the rule of *Clark v. Durand* and *Kerman v. Howard* must be adhered to by this court. * * *

Did the death of the beneficiaries,¹ their father surviving them, of itself abrogate the stipulation making the insurance money payable as therein prescribed? If such was the legal effect of the death of the beneficiaries, undoubtedly the proceeds of the policy are a part of the estate of Walter H. Ballou, and should be awarded to his administrator, the appellant. The solution of this question requires a consideration of the relations of the beneficiaries to the policy, and their interest (if they have any) in it.

In the Minnesota case, above cited, it was held that the taking of the policy payable to the beneficiaries was an irrevocable and executed voluntary settlement upon the beneficiaries, and that the latter had an absolute vested interest in the proceeds of the policy, which could only be divested with their consent. This is an extreme view, and is in conflict with our own cases. On the other hand, it was said in *Clark v. Durand*, *supra*, that the beneficiary has no present beneficial interest, no vested right, in the policy or the moneys agreed therein to be paid; and it must be conceded that the judgment in that case was placed upon the ground that during the lifetime of the insured the party beneficially interested had no actual equitable interest therein. This, also, is an extreme view in the

¹ Walter Ballou, the father, took out the policy upon his own life, payable to his two minor sons, "their guardians, executors, administrators or assigns."

opposite direction to the Minnesota case. Of course, we cannot adopt the doctrine of the Minnesota case to its full extent; for, as already observed, it overturns *Clark v. Durand* and *Kerman v. Howard*. But if there is any middle ground upon which the judgments in these cases may rest, and which commends itself as more reasonable and just, it ought to be adopted. We believe there is such ground, and we feel at liberty to adopt it. Notwithstanding what was said in *Clark v. Durand*, we think the taking of the policy by the insured, payable to another, is so far in the nature of an executed voluntary settlement that it vests in the person to whom the insurance money is made payable an actual subsisting interest in the policy, but not the absolute, unconditional ownership of it, and of the moneys therein agreed to be paid. The interest of the beneficiary is subject to the right of the insured, who has paid the premiums, to revoke the same and retain it himself or vest it elsewhere. At least, he may do this with the consent of the company which issued the policy. * * *

We conclude that, under the circumstances of the case, the beneficial interest of the children under the policy did not lapse by their death (their father surviving them), but goes to their administrator to be distributed as intestate estate of such children, and that the court properly awarded the proceeds of the policy to him.

The judgment of the Circuit Court must therefore be affirmed.

GLENN v. BURNS.

100 TENN. 295. — 1893.

BEARD, J. — In 1869, M. Burns, Sr., took out two policies of insurance on his own life of the respective amounts of \$10,000 and \$5,000. In the policies it was provided that this insurance should be paid to his wife, Margaret, if living at the time of his death; but, in the event she should die before his decease, then "to their children, for their use, or to their guardian, if under age." At the date of their issuance Mr. and Mrs. Burns had nine living children, three of whom died before their mother. In 1885 she died, leaving

¹ The effect of the application of this rule to the present case was to hold that while the assured was free to change the beneficiaries, still they had such a vested present interest in the policy that their interest did not lapse, upon their predeceasing the assured, if the assured had not changed the beneficiaries before his death. The personal representatives of the beneficiaries were entitled to the proceeds of the policy.

surviving her husband and six children. Upon the death of Mr. Burns, which occurred several years thereafter, the insurance was paid to the complainant Glenn, when, a controversy having arisen as to a proper distribution thereof, this bill of interpleader was filed. The record presents a single question, and that is, did the children of Mr. and Mrs. Burns take each an interest in these policies, immediately upon their delivery, and, if so, were the interests of the three whose deaths antedate that of the mother transmitted to their distributees and representatives? This question seems first to have been considered by the Supreme Court of Connecticut in the case of *The Continental Life Insurance Co. v. Palmer*, 42 Conn. 60, upon a policy similar in its provisions to those issued to Mr. Burns, and in a controversy between the representative of a child which predeceased its mother and children who survived both the mother and father. That court, in an able and exhaustive opinion, held that each child, upon the delivery of the policy, took a transmissible interest in it; and that, the mother having died before the father, at his death the distributee of the dead child stood in the place of its parent, and was entitled to share with the living children in the insurance fund. On this point the court said: "The moment this policy was executed and delivered, it became property, and the title to it vested in some one. It will not be claimed that it vested in the person whose life was insured. It must have vested, then, in all or in a part of the payees. The payees consist of two parties, the wife and the children. As only one could take and enjoy the property ultimately, it did not vest in all as tenants in common, nor did it vest in either so as to give a right to the present enjoyment of it. It was not, however, a mere expectancy, nor a naked possibility, but it was a possibility, coupled with a present interest. It was visible, tangible property, and, like any other insurance policy, it was capable of assignment, and had an appreciable value. Each party took a conditional, not an absolute, right to the whole policy. It was not a condition precedent, but subsequent. * * * The right to the policy, in a strict sense, was not contingent; the possession and enjoyment of the fund thereby created were postponed to the future, and were contingent. This contingency applied to both parties, — to the wife as well as to the children. * * * In respect to each it was then a present right to the future enjoyment of property, but it was liable to be defeated by a subsequent contingency, and was certain to be defeated as to one of them. That such a right is recognized as property, and is transmissible to heirs, is a proposition abundantly sustained by the authorities." This rule, thus announced, and enforced with so much

vigor of statement, has been adopted, either upon the authority of that case or else upon considerations of a similar character, in *Estate of Conrad*, 89 Iowa, 396, 56 N. W. 535; *Suggs v. Hooker*, 102 N. C. 115, 8 S. E. 919; *Cunningham v. Smith*, 79 N. C. 303. On the other hand, the Supreme Court of New York rejects this view, and applies the class doctrine to such policies, so that under the rule there recognized only such children take as are alive at the death of the insured. *United States Trust Co. v. Mutual Ben. Life Ins. Co.*, 115 N. Y. 152, 21 N. E. 1025; *Walsh v. Insurance Co.*, 133 N. Y. 408, 31 N. E. 228. In this latter case the justices of the general term in distributing the proceeds of such a policy had applied the Connecticut rule, but on appeal their judgment was reversed, and the "class doctrine" was adhered to; evidently on the ground of *stare decisis*. In delivering the opinion of the Supreme Court, we think Justice Gray, in reply to a strong argument at the bar against the application of this doctrine to such a contract, clearly indicates the court's dissatisfaction with it in the following words: "If we were at liberty to treat this question at first hand, and as altogether an original one in this court, I should say that the arguments to sustain the judgment of the general term are cogent, and not easily overcome. Certainly, they have a moral support in equitable considerations. But if we are to be guided, in the disposition of the cases which come before us, by the principle of *stare decisis*, then we must adhere to views which have been held and assented to within recent decisions." The Supreme Court of Alabama in *Continental L. Insurance Co. v. Webb*, 54 Ala. 688, coincides with New York in the application of the class doctrine to such a policy; but both courts agree that on the delivery of the policy the children then alive have a contingent interest in it, yet they also agree in holding it nontransmissible. We think the view of the Supreme Court of Connecticut is supported by the better reason, as well as the weight of authority. For when it is conceded that the then living children have such an interest, this is necessarily a property right, though subject to be defeated or destroyed by the contingency of the mother (the assured) outliving the father (the insured); in other words, by a condition subsequent. If property, it was none the less alienable, however much its value was affected, because contingent; and, if alienable, certainly it was transmissible. That such an interest is the subject of disposition, as other property, we think, is well established. [*Here follow extracts from Washburn on Real Property*, 5th ed., vol. 2, p. 611; *Jarman on Wills*, vol. 2, p. 479; *Ins. Co. v. Palmer*, 42 Conn. 60; *Read v. Mosby*, 87 Tenn. 759.] We are satisfied to adopt the rule as announced by the Supreme Court of Connecticut, not

only because we regard it as sustained "by the weight of authority" (see editorial note to *Estate of Conrad, supra*, 48 Am. St. Rep. 396), but because in this case, as well as in all similar cases, it produces results which may be reasonably assumed to have been within the contemplation of the parent, who secures and carries the policies of life insurance. In the present case no reason has been, and we think none can be, assigned, why Mr. Burns, the father, in taking out the policies, and making in them a contingent provision for his children, would have desired or intended to devolve their proceeds upon his surviving children, to the exclusion of the distributees of others of that class who might die before the contingency occurred. It is a natural presumption, growing out of the relation of the parties, and strengthened by equitable considerations, that he assumed in the event of such an emergency the statute of distributions would be resorted to for the protection of the interest of those who stood in the room and stead of the dead child or children.

PULLIS *v.* ROBISON.

73 Mo. 201. — 1880.

NORTON, J. — This is a proceeding in the nature of a creditor's bill, instituted by certain creditors of James P. Robison, deceased, whose claims had been allowed by the Probate Court against his estate, to subject to the payment of said debts the proceeds of certain policies of insurance taken out on the life of said Robison, and made payable to his wife. The creditors suing are three in number, and each having brought a separate action, the three suits were consolidated and tried together. Three of the policies, the proceeds of which constitute the subject-matter of controversy, were issued by the Mutual Benefit Life Insurance Company, each of them being for \$5,000, and dated respectively February 26th, 1867, February 21st, 1868, and May 12th, 1870. The amount of the annual premiums was as follows: \$283 on the one dated in 1867, \$263 on the one dated in 1868, and \$289 on the one issued in 1870. The plaintiffs claim and allege in their bill that Robison was in embarrassed circumstances, and at the time the premiums were paid he was insolvent, and that said policies were donated to his wife, and were procured for the purpose of hindering, delaying and defrauding creditors. Defendant, Mrs. Henrietta Robison, to whom said policies were made payable, denies all the allegations of the bill, and asserts her right to the proceeds of the same.

Upon the trial of the issues thus tendered, the court found that Robison was solvent at the time said policies were taken out, and remained solvent till about the year 1876; that the payment of the two last premiums on two of said policies, amounting to \$342.05, dated respectively in 1867 and 1868, which payment occurred in 1876, was made by Robison while he was insolvent, and that all payments of premiums anterior to 1876 were made by him when he was solvent. Upon this finding the court decreed that Mrs. Robison was entitled to the proceeds of the policies, less the amount of premiums paid by Robison when insolvent, with the interest thereon, and also decreed that Mr. Pullis, the plaintiff who first brought suit, was entitled to the whole amount of the premium paid in 1876 with its interest. From this judgment plaintiffs appealed to the St. Louis Court of Appeals, where the judgment was affirmed, and from this judgment they appealed to this court.

The evidence adduced on the trial, we think, was sufficient to justify the trial court in finding the facts above set forth, and we will, therefore, accept its finding as correct, and thus accepting it, the question presented for our determination is, whether, on the facts, the court in its decree properly disposed of the funds in dispute. Plaintiffs insist that error was committed in this respect, and contend that the premiums paid by Robison in 1876, being in excess of the sum of \$300, and having been paid while he was insolvent, out of funds which ought to have been appropriated to the payment of his debts, entitles them to so much of the proceeds of the policies as may be necessary to satisfy in full their claims as creditors, even though it should consume it all.

We think it settled that the wife has such an interest in the life of her husband as to make valid an insurance effected on his life for her benefit. This has been so held in the case of *Gambs v. Covenant Mutual Life Ins. Co.*, 50 Mo. 44. We think it also settled that when such a policy issues and expressly designates a person who is to receive the insurance money, such designation is conclusive unless some question arises as to the right of creditors of the person who paid the premiums. "The receipt of the designated person will discharge the company, and such person will be entitled to maintain an action against the company." *Bliss, Life Ins.*, § 317. We think it also settled that a husband who is solvent has the right to effect an insurance on his life for the benefit of his wife, and to pay the annual premiums thereon so long as he remains solvent and can do so without prejudice to, or in fraud of, the rights of creditors. *Larkin v. McMullin*, 49 Pa. St. 29. To what extent, if to any extent, the husband can affect the rights of the wife in such a

policy, by an assignment or other disposition of it, is a question which does not arise in this case, and we have, therefore, deemed it unnecessary to notice the numerous authorities cited by counsel bearing on that point.

The interest of the wife in a policy of insurance on the life of her husband, effected for her benefit by the husband while in unembarrassed circumstances, and fully able to discharge all his indebtedness, is not affected, as plaintiffs contend it is, by section 15, Wagner's Statutes, 936, if the husband remains solvent during the time the policy is kept alive by his paying the annual premiums. That section provides that a married woman may cause to be issued for her sole use a policy of insurance on the life of her husband, and in case she survives him, that the insurance money shall be payable to her, free from the claims of the representatives of her husband, or of any of his creditors, but such exemption shall not apply when the amount of premiums annually paid shall exceed \$300.¹ We do not think this statute can be so interpreted as to curtail or restrict the right of a solvent husband to apply only \$300 of his means annually to the payment of premiums on his life policy procured for the benefit of his wife. * * *

We think it was the purpose of the statute to allow a husband who might be in an embarrassed and even in an insolvent condition to secure to the wife the benefit of an insurance on his life free from the claims of creditors when the annual premium on such policy does not exceed \$300; or, in other words, that he might annually withdraw for such a purpose that sum without subjecting the amount insured to the payment of creditors. Previous to the enactment of the statute, an insolvent husband could not apply any portion of his means to such a purpose, and deprive creditors of the right of asserting their claims to all the benefits resulting from such application. The object of the statute, in our opinion, was to change this rule to the extent indicated in the act. It follows from the view we have taken that inasmuch as all the premiums paid by Robison, except the sum of \$343 paid in February, 1876, were paid while he was solvent, Mrs. Robison is entitled to the benefits resulting therefrom, and that the last payment being in excess of \$300, and made while Robison was insolvent, should go to the benefit of the plaintiffs.

It is insisted, by counsel, that inasmuch as the payment made in 1876 kept the policies on foot and gave them vitality, the whole amount of the insurance money, or so much thereof as will be suffi-

¹ Similar statutes exist in several States.

cient to satisfy their debts, should be so applied. We have not been cited to, nor have we been able to find any authority that goes to that extent, nor are we acquainted with any equitable principle on which the claim can be founded. How the insurance money, under the facts and circumstances of this case, should be apportioned, presents a question of some difficulty, especially so as the authorities we have been able to examine are conflicting in the rules laid down. The case of *Landrum v. Knowles*, 22 N. J. Eq. 594, goes farther in support of plaintiffs' position than any which has fallen under our observation, and it falls far short of what is contended for by them. In that case the wife insured the life of her husband for the benefit of her children, and after paying the annual premiums for about ten years assigned the policy, in conjunction with her husband, to one of the husband's creditors in payment of the debt. After said assignment the wife ceased to pay the premiums, but they were paid for about nine years by the creditors. Upon the death of the husband the insurance money was claimed by the children on one hand, and the assignee on the other, and the chancellor decided that the children were entitled to the cash value of the policy at the time it ceased to be kept alive by the mother, and that the residue of the money due on the policy should be paid over to the assignee.

On the other hand, in the case of *Trough's Estate*, 8 Phila. 214, where Trough, having taken out a policy on his life, assigned the same, while solvent, to a trustee for the benefit of his children, and becoming insolvent thereafter, still continued to pay the premiums, in a contest for the insurance money between the children and Trough's creditors, the rule was laid down that the only claim the creditors could sustain would be the amount of the premiums paid by Trough to keep the policy alive after he became insolvent.¹

The object of such rules being to do exact justice between the contending parties and to distribute the fund according to their rights, it appears to us that neither of the above rules accomplishes the object; and inasmuch as the insurance money in contest in this case was the product of all the premiums paid, we think a just distribution of it would be obtained by declaring that Mrs. Robison should be decreed to have so much of the fund as was produced by the payment of the premiums by her husband when solvent, and plaintiffs so much as the premiums paid by Robison when insolvent

¹ In this case, on appeal (75 Pa. St. 115), the decree was reversed on the ground that the assignment to the trustee operated neither as an executed gift nor as the creation of a valid trust.

contributed to produce; that is, that plaintiffs are entitled to recover the same proportional part of the whole insurance money that the premiums paid by Robison when insolvent bear to the premiums paid by him when solvent. Giving effect to this rule in the disposition of the case, and accepting the fact found by the court that Robison, after his insolvency, paid \$342.05 as being correctly found, and the further fact, as shown by the record, that Robison had paid on two of said policies during his solvency premiums amounting to \$4,650, plaintiffs would be entitled to recover the sum of \$686.84, and Mrs. Robison the residue.¹

As plaintiff Pullis in the race of diligence was the first to file his bill, asking an appropriation of the fund to the payment of his demand, he has obtained a priority over the other creditors, and the said sum of \$686.84 should be applied on his debt. *George v. Williamson*, 26 Mo. 193. The judgment will be reversed and cause remanded, with directions to the Circuit Court to enter up a decree in conformity with this opinion, directing the receiver in whose hands the fund has been placed, to pay first the costs of the suit, next the sum of \$686.84 to plaintiff Pullis, and next the residue to defendant, Mrs. Robison. All the judges concur.²

¹ "From the fact that frequently many years elapse between the issuing of a policy and the time when the insurance falls due, it may often happen that the insured, though solvent when the policy was issued, has paid some of the latter premiums when insolvent. In that case the proper distribution of the proceeds would depend on the view taken by the court of the nature of a policy of insurance. By some courts it is held that each premium is a portion of the consideration for which the company promises to pay the amount of the insurance. If that view be taken the creditors would be entitled to such a proportion of it as the amount, with interest, of the premiums paid by the insured when insolvent bears to the whole amount of the premiums with interest. *Pullis v. Robison*, 73 Mo. 201. The more usual doctrine, and that held by the Supreme Court of the United States (*Central Bank v. Hume*, 128 U. S. 195), is that the payment of the first premium alone is the consideration of the contract and that payment of the subsequent premiums is merely a condition. Under that view, creditors would be confined to the recovery of the premiums paid by the insured after he became insolvent, with interest; since those premiums did not form the consideration for the policy, and therefore payment of them can give no other right than an equitable lien for the amount paid in fraud of creditors. The beneficiaries named in the policy would be entitled to the rest. *In re Bear v. Steinberg*, 11 N. B. R. 46." — Prof. Williston in 25 *Am. Law Rev.*, pp. 196-197.

² *Contra*, *Central Bank v. Hume*, 128 U. S. 195, holding that the proceeds of a life policy taken out by an insolvent debtor in his wife's name, cannot be reached by his creditors after his death, nor can the amount paid in premiums by the insolvent debtor be recovered by the creditors; the widow being entitled to the whole. The case is severely criticised by Prof. Williston in 25 *Amer. Law Rev.* 185, reviewing the English and American authorities. He summarizes the

opinion of the court as follows: " Chief Justice Fuller delivered the opinion of the court. He admits that a voluntary assignment of a policy of insurance, effected by an insolvent in favor of his executors could not be sustained under the statute of 13 Eliz., c. 5, but he adds, the rule applies only to what the creditor could have made available for the payment of his debts, whereas these policies of insurance were made directly to the wife and Mr. Hume could exercise no control over them. The conclusion is, therefore, drawn that at any rate the creditors could not claim the whole proceeds of the policies, and the question is then examined whether the creditors were entitled to a return of the premiums. The question is answered in the negative. It is hinted that perhaps the fact that Hume was largely indebted to his mother-in-law and that the money received from her was to have been used for the benefit of his family, or the laws of the States where the insurance companies were formed, might perhaps affect the question; but these points are waived, the court preferring to rest the decision broadly on the following basis. ' The argument in the interest of creditors concedes that the debtor may rightfully preserve his family from suffering and want. It seems to us that the same public policy which justifies this, and recognizes the support of wife and children as a positive obligation in law as well as morals, should be extended to protect them from destitution after the debtor's death, by permitting him not to accumulate a fund as a permanent provision, but to devote a moderate portion of his earnings to keep on foot a security for support already, or which could thereby be, lawfully obtained, at least to the extent of requiring that under such circumstances the fraudulent intent of both parties to the transaction should be made out. And inasmuch as there is no evidence from which such intent on the part of Mrs. Hume or the insurance companies could be inferred, in our judgment none of these premiums can be recovered.' "

Professor Williston says in conclusion: " It is not intended to find fault with the statutory provisions allowing an insolvent debtor to insure his life for the benefit of those dependent upon him. It may well be that such a policy is better for society than to require all assets of every kind to be given up to creditors. What is insisted upon is this, that by the common law as brought to this country, no exceptions were made to the sweeping rule that an insolvent debtor could not, in any way, convey his property to a volunteer, so as to free it from the claim of creditors. The statutes themselves above referred to are an admission of this, for if the law without the statutes were not what is contended, why pass the statutes? If, now, the sentiment is right and just that a man should make provision — to some extent at least — for those dependent upon him, before paying his debts, and if that sentiment exists among a majority of the people, it should find expression in statute, and the extent of the right should so be properly defined. Till then the rule of the common law should prevail and the courts, uninfluenced by considerations of ' meritoriousness ' which are for the Legislature to consider, should enforce the law.' "

RIGHT OF THE BENEFICIARY TO SUE.—The well established right of a beneficiary to sue upon a life insurance policy does not seem to have been judicially discussed in relation to the larger question as to the right of a third person to sue upon a contract made for his benefit. In most American jurisdictions such third person can sue. In Massachusetts, on the contrary, he cannot; neverthe-

c. Mutual Benefit Insurance.

SUPREME CONCLAVE, ROYAL ADELPHIA *v.* CAPPELLA
ET AL.

41 FED. REP. 1, (CIRCUIT CT. E. D. MICH.) — 1890.

IN EQUITY. This was a bill of interpleader to settle the title to a certain benefit certificate issued by the plaintiff to Leo F. Kratzsch, a member of Carpenter Conclave, No. 17, Royal Adelpia, located

less in that jurisdiction the beneficiary of a life insurance contract can sue; the taking out of such a policy being deemed a declaration of trust, though the beneficiary is allowed to proceed at law. *Pingrey v. Ins. Co.*, 144 Mass. 374, (*ante*, p. 367, *note*) The effect of most of the decisions seems to be that the insured through the operation of the contract with the insurers creates a *res* in the nature of property which thenceforward belongs to the beneficiary. In *Ricker v. Co.*, 27 Minn. 193, the court describes as follows the transaction and its effect, where one takes out a policy on his own life and makes the amount payable to a beneficiary: "What he [the insured] did was a 'clear and distinct act,' wholly divesting himself of all ownership or control over the money paid for the insurance, disclaiming any interest in the policy, or intention to take or hold it for himself or his legal representatives, at the same time putting it beyond his power so to do by the stipulation obligating the company to pay the sum insured, whenever it should become due, to such of the persons named in the policy as might then be entitled thereto by its terms. Taking the delivery of the policy from the company, under these circumstances, can only be construed as an act of acceptance for the designated beneficiaries, and his subsequent holding of the same as that of a naked depositary, without any interest, for those entitled thereto. * * * As the insured had no legal or equitable interest in the policy at the time of its surrender and cancellation the act was a nullity and could not affect the rights of his children, to whom it then belonged, and who alone could release the company from the obligations it contained."

The situation may, perhaps, be assimilated to that in *M'Carty v. Blevins*, 5 Yerg. 195, where Rogers agreed with Buler that his horse should go to the mare of Buler without pay, provided the produce should be the property of Blevins; and it was held that the property in the produce of the mare was vested by the contract in Blevins and that he could recover the colt from one who had purchased it from Buler.

KILLING OF THE ASSURED BY THE BENEFICIARY.—"The only question of law presented in this record is, does an insane beneficiary in a life insurance policy, who kills the insured under such circumstances as would cause the killing to be murder if the beneficiary were sane, thereby forfeit his right to recover the insurance money? This presents a question of first impression. * * * The causing the death of an assured by felonious means, by a sane assignee of a policy of life insurance, has been held sufficient to defeat a recovery on the policy. *New York Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591; *Prince of Wales Ins. Co. v. Palmer*, 25 Beav. 605. * * * We hold: where an insane beneficiary in a life policy kills the assured under such circumstances as would cause the killing to be murder if the beneficiary were sane, such killing does not cause a forfeiture of the policy nor bar his right of recovery for the insurance money." — *Holdom v. A. O. U. W.*, 159 Ill. 619.

at Milwaukee, and payable on its face to defendant Cappella, the aunt of the insured. Her title to this certificate, however, was disputed by defendant Julius Kratzsch, father of the deceased member, upon the following state of facts:

The certificate in question, which was for the sum of \$3,000, was originally issued October 17, 1885, to Leo F. Kratzsch, and made payable to his sister Emma, in accordance with the laws of the order, one of which provided as follows: "A member may at any time, when in good standing, surrender his benefit certificate, and a new one shall be issued, payable to such beneficiary or beneficiaries as such member may direct, in compliance with the laws and usages of the order, and the payment of a fee of fifty cents. Said surrender and direction must be made in writing, signed by the member, and forwarded under the seal of the subordinate conclave, with the benefit certificate, to the supreme secretary," who resided in Detroit.

In March, 1888, the insured member, being then afflicted with a pulmonary disease, went to Florida for the benefit of his health. He returned in June by the way of St. Louis, and remained there for about three weeks, at the house of one Pesch, for whom his aunt, Miss Cappella, was housekeeper. His aunt took care of him during his stay, and loaned him \$400; he saying to her that he would "will her the policy," and that "he wanted her to have it." Soon after his arrival home, and on June 23d, he surrendered his certificate, and procured another to be issued in favor of the defendant Cappella. In the month of August, the insured, being then at the residence of his father, the defendant Julius Kratzsch, about thirty-five miles from Milwaukee, and in the last stages of consumption, sent for the defendant Cappella, who came from St. Louis, where she resided, to Kratzsch's house. There was some dispute as to what took place there, but it seems to have been agreed that the certificate then in force should be surrendered, and a new one issued, wherein Miss Cappella should be made a beneficiary to the extent of \$1,000, and the defendant Julius Kratzsch to the extent of \$2,000. For the purpose of carrying out such arrangement, Leo made a request in writing, directed to the collector of Carpenter Conclave, No. 17, requesting him to cause his benefit certificate to be changed in accordance with such agreement; which request was delivered to defendant Cappella upon her promise to hand it, together with the fee of fifty cents, to the collector of such conclave, to be forwarded to the supreme secretary at Detroit. Miss Cappella also agreed to call upon one Mueller, at Milwaukee, to whom Kratzsch had given the certificate then in force, and procure such

certificate from said Mueller, and deliver the same to the collector, to be surrendered by him to the supreme secretary. Up to this time Miss Cappella had never been in actual possession of the certificate then in force. After leaving Kratzsch's house, Miss Cappella went to Milwaukee, obtained the certificate then in force from Mueller, but did not deliver the request for the change of the certificate to the collector of Carpenter Conclave, but retained possession of the one received of Mueller. Upon returning to St. Louis, on the 26th of August, she addressed a letter to the insured Leo, in which, speaking of the certificate, she said:

"I went to Mr. Eckstein, and he advised me not to have it changed. If anything would happen to you, dear Leo, while it is getting changed, they would not pay the money. And he said you could not write your name so plain any more as you used, and then they could make trouble through that. It takes four or five weeks to change that policy. I think it is best to leave it the way it is, and I won't cheat your father out of that money."

This letter, though affectionate, was not entirely satisfactory, and, on the 14th of September, Leo, being then very near his end, signed and duly executed and acknowledged an instrument in writing, directed to the supreme secretary of the plaintiff, requesting plaintiff to change his certificate in accordance with his original agreement with Miss Cappella, and stating that he could not make an actual surrender of the certificate then in force, because the same was in possession of the defendant Cappella. This instrument was duly attested by the secretary of Carpenter Conclave, No. 17, sealed with the seal of the conclave, and on the 18th of September delivered to and received by the supreme secretary of the plaintiff, together with the fee of fifty cents required by the rules of the order. On the 19th of September the insured died at the residence of his father. Due proof having been made of his death, the plaintiff audited the claim upon which it became liable, by reason of his death, at the sum of \$2,910, being the amount of the certificate, less the sum of \$90 paid prior to his death. Suits having been begun by Miss Cappella in this court, and by the defendant Julius Kratzsch in the State court at Milwaukee, plaintiff filed this bill of interpleader to compel defendants to litigate their respective claims upon the fund, and paid into court the amount of the certificate as audited.

BROWN, J. — This is one of a class of cases which have become quite common within the past twenty-five years, arising out of an inexpensive method of insurance, by which persons in moderate circumstances may, by the payment of a small monthly assessment, secure a provision for themselves or their families in case of sick-

ness, accident, or death. Much of the law applicable to ordinary cases of life insurance is equally applicable here. In a few particulars, however, it seems to be somewhat less favorable to the person for whose benefit the policy is taken out. For instance, in case of an ordinary policy, the right of a person for whose benefit the policy is issued cannot be defeated by the separate and joint acts of the assured and the company, without the consent of the beneficiary, *Bliss, Ins.*, § 318; while it is entirely well settled that in cases of this description the beneficiary has no vested interest in the benefit certificate until the death of the insured member. Up to this time he may change his designation of beneficiary at will, against the consent of such beneficiary, even though the latter may have advanced the money to pay the assessments upon the certificate. *Bac. Ben. Soc.*, § 306; *Lamont v. Association*, 30 Fed. Rep. 817; *Wendt v. Legion of Honor*, 72 Iowa, 682, 34 N. W. Rep. 470; *Association v. Montgomery*, 38 N. W. Rep. 588; *Fisk v. Union*, 11 Atl. Rep. 84; *Hellenberg v. District No. 1*, 94 N. Y. 580; *Society v. Burkhardt*, 110 Ind. 192, 10 N. E. Rep. 79, and 11 N. E. Rep. 449; *Holland v. Taylor*, 111 Ind. 121, 12 N. E. Rep. 116; *Lamont v. Grand Lodge*, 31 Fed. Rep. 177; *Schillinger v. Boes*, 3 S. W. Rep. 427; *Knights of Honor v. Watson*, 15 Atl. Rep. 125; *Beatty's Appeal*, Id 861; *Byrne v. Casey*, 70 Texas, 247, 8 S. W. Rep. 38.

In making such change of beneficiary, however, the insured is bound to do it in the manner pointed out by the policy and the by-laws of the association, and any material deviation from this course will invalidate the transfer. Thus, if the certificate provides that no assignment shall be valid unless approved by the secretary, an assignment without such approval will be invalid. *Harman v. Lewis*, 24 Fed. Rep. 97, 530. So, if it be provided that such change must be made on a prescribed form or blank, the signature to which shall be attested before a notary, and the change entered upon the books, an assignment to a creditor as collateral security, not made upon the prescribed blank, and of which the association had no notice until after the death of the member, was held to be fatally defective. *Association v. Brown*, 33 Fed. Rep. 11. So, where the certificate required every surrender to be in writing, attested by the reporter under the lodge seal, it was held that a conditional surrender of the same by the holder, not to take effect until after his death, and not made in the presence of or attested by such lodge reporter, was invalid. *Supreme Lodge v. Nairn*, 60 Mich. 44, 26 N. W. Rep. 826. See, also, *Wendt v. Legion of Honor*, 72 Iowa, 682, 34 N. W. Rep. 470; *Elliott v. Whedbee*, 94 N. C. 115; *Mellows v. Mellows*, 61 N. H. 137; *Highland v. Highland*, 109 Ill. 366. So, if

the by-laws fix definitely the manner of changing the beneficiary by his action during his life, an attempt to divert the benefit by will has usually been held to be abortive. *Holland v. Taylor*, 111 Ind. 121, 12 N. E. Rep. 116; *Stephenson v. Stephenson*, 64 Iowa, 534, 21 N. W. Rep. 19; *Insurance Co. v. Miller*, 13 Bush. 489; *Vollman's Appeal*, 92 Pa. St. 50; *Renk v. Herrman Lodge*, 2 Dem. Sur. 409; *Daniels v. Pratt*, 143 Mass. 216, 10 N. E. Rep. 166.

There are, however, three exceptions to this general rule requiring an exact conformity with the regulations of the association:

(1) If the society has waived a strict compliance with its own rules, and, in pursuance of the request of the insured to change his beneficiary, has issued a new certificate to him, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued. This naturally follows from the fact that, having no vested interest in the certificate during the lifetime of the assured, he has no right to require that the rules of the association, which are framed alone for its own protection and guidance, are not complied with. *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. Rep. 657; *Splawn v. Chew*, 60 Tex. 532; *Manning v. Ancient Order*, 5 S. W. Rep. 385; *Society v. Lupold*, 101 Pa. St. 111; *Brown v. Mansus*, 5 Atl. Rep. 768; *Knights of Honor v. Watson*, 15 Atl. Rep. 125; *Byrne v. Casey*, 70 Tex. 247, 8 S. W. Rep. 38; *Titsworth v. Titsworth*, 20 Pac. Rep. 213. The case of *Wendt v. Legion of Honor*, 72 Iowa, 682, 34 N. W. Rep. 470, appears upon its face to lay down a different rule, but upon examination it will be seen that the change was attempted to be made by a paper which the insured called his last will, but which was no will in law; and the court held that, the interest of the beneficiary having become vested by the death of the insured, they had acquired rights which could not be cut off, except in the manner prescribed in the contract. This case, evidently, has no application to a change made prior to the death of the insured.

(2) If it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made. Thus, in the case of *Grand Lodge v. Child*, 70 Mich. 163, the insured made his betrothed the beneficiary, and subsequently lost his certificate. His beneficiary having married another, he made a statement of the loss, and applied for a reissue of the certificate, making his son the beneficiary. His application was refused. The rules of the organization required the change to be indorsed on the original certificate, but, by the advice of the officers, he attempted to make the change of beneficiary by giving a power of attorney to another to collect the amount

which should accrue under the certificate. It was held that such acts constituted an equitable change of beneficiary, and that the son was entitled to the fund. The court held that the insured had done all that he could, and all that he was required in equity to do, to change the donee of the certificate. "The rules of the order allowed him to do this, and it was not in the discretion of the order to prevent it. * * * The law never requires impossibilities; and the rules of the order, which required the certificate to be surrendered when a change of the beneficiary was made, that it might be indorsed upon the certificate, could only be construed as requiring that to be done when the certificate was in existence. The existence of the right to share in the benefits of the order, and to direct who should receive the fund in case of the death of a member, was a right vested in the member as soon as he became entitled thereto, and the certificate was only evidence of the existence of that right, and, when that evidence was lost, the right remained, and its existence could be established by any other competent evidence; and the same is true of the existence of the change directed by the member of the beneficiary."

(3) If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but, before the new certificate is actually issued, he dies, a court of equity will decree that to be done which ought to be done, and act as though the certificate had been issued. The case of *Association v. Kirgin*, 28 Mo. App. 80, is an illustration of this exception. In this case the insured, having met with a fatal accident, called a friend, and requested him to take his certificate to the association and surrender it, pay the fee of fifty cents, and request them to issue a new one, payable to his wife. This was done, and a minute of the transaction was made on the records of the association for that day. On the following day the insured died. It was held that in doing this he had done all that the laws of the order required to be done on his part in order to have a new certificate; that his right to make the change was absolute, and that the association had no right to refuse his request; and, further, that the fact that the certificate was issued after his death was immaterial, since the certificate was not the right itself, but merely the evidence of the right. See, to the same effect, *Mayer v. Association*, 2 N. Y. Supp. 79; *Supreme Lodge v. Nairn*, 60 Mich. 44, 26 N. W. Rep. 826; *Kepler v. Supreme Lodge*, 45 Hun, 274. The case of *Ireland v. Ireland*, 42 Hun, 212, is distinguishable from these in the fact that the insured made no written request for a change, as required by the rules, but merely delivered the certificate to a friend,

telling him he wanted it changed. This was manifestly insufficient.

We think the case under consideration falls within these exceptions. Five days before the death of the insured, he signed and acknowledged before a notary a written application for a change in his certificate in the form prescribed by the by-laws, stating that the original certificate to Anna Cappella was in her possession, and beyond his control. This application was delivered to the secretary of the Carpenter Conclave at Milwaukee, who affixed the seal of the conclave, and forwarded it to the supreme secretary. It is true, he did not surrender the original certificate, as required by the regulations; but he had done all in this connection which was within his power, or which he could reasonably be required to do. He had requested defendant Cappella to obtain it of Mueller, and deliver it to the proper officer at Milwaukee, and had taken her word that she would do so. She probably went to Milwaukee with that intention, but upon calling upon Mr. Eckstein, the collector of the Carpenter Conclave, she says he advised her that it would take four or five weeks to make a change, and she had better not do it. This was before she had obtained the certificate of Mueller. It is but just to Mr. Eckstein to say that he gives an entirely different version of the transaction, and swears that she told him that she had been prevailed upon to make the change in the benefit certificate which was entirely satisfactory to her, saying that \$1,000 was all she cared for, seeing that that was the amount the insured was owing her. Says he:

"I asked her whether she had something written to that effect; that it should be made in that manner, or indorsed on the certificate. She said that nothing had been indorsed on the certificate, but she was perfectly willing to leave it as it was, and to give the father bonds or some security for the \$2,000."

Upon arriving at St. Louis, she writes Leo that she thinks it best to leave it the way it is, and that she will never cheat his father out of the money. Her purpose was illy concealed by this letter. Upon the stand she explains this by saying that Leo was being annoyed by his father about the certificate, and she wished to put his mind at rest, that he might die in peace, and that his father might understand that he was to have the benefit of two-thirds of the certificate. In short, she leaves us to infer that she never really intended to make the change. Our impression, however, is that she did intend, at first, to comply with Leo's request, but was overpersuaded by someone to change her mind. With regard to the writing which she received from Leo, she first says that it was destroyed, and then that it was lost; but, whichever it was, it is

clear that the certificate was as much lost to the insured as if it had been destroyed. While the supreme secretary may have been justified in refusing to issue a new certificate without a surrender of the old one, according to the requirements of the order, it certainly does not lie in the mouth of Miss Cappella to set up this failure in a court of equity, when she herself is a cause of it, and the company has admitted its liability by the payment of the money into court. No maxim of the law is founded upon more substantial justice than that which declares that no one shall take advantage of his own wrong. Under the by-laws of the company, the insured had a legal right to change his beneficiary whenever he pleased; and the consent of the company does not seem to be required, much less that of the beneficiary. Were the non-surrender of the certificate set up by the company in a common-law action brought by Kratzsch, it is possible that the court might be compelled to hold that he had failed to establish his title; but when the company waives this defense, or at least disclaims any interest in the result of the controversy, the objection comes with ill grace from one who is solely responsible for such non-surrender. A court of equity is seldom embarrassed by technicalities, and will make such a decree as the justice of the case manifestly requires. The cases above cited, which establish the proposition that the failure to take the proper steps to change the designation can only be taken advantage of by the company itself, are equally pertinent to show that it cannot be made available by one standing in the relation of Miss Cappella to this fund. The case of *Hainer v. Legion of Honor*, 78 Ia. 245, is instructive in this connection. In this case the deceased had made his certificate payable to his mother. Upon the back was a printed blank designed for changing the designation. After the issuance of the certificate, the insured married, and subsequently died, leaving a will, in which he bequeathed one-half of the amount due upon the certificate to his daughter. The association appeared, and paid into court the amount of the certificate. It was held that the mother, having known of the provisions of the will, and having made no objections thereto, but, on the contrary, having expressed her acquiescence in the same, and taken possession of certain real property devised to her, and otherwise having availed herself of the benefits conferred upon her by the will, was estopped to claim the full amount of the certificate. The court held that, although a change of beneficiaries by will was not such a compliance with the regulations of the company as would entitle the person named in the will to recover, yet the company having disclaimed any interest in the controversy by the payment of the

money into court, the original beneficiary was estopped by her conduct in taking under the will to repudiate the provision by which one-half of the certificate was bequeathed to the daughter. The case of *Marsh v. Supreme Council*, 149 Mass. 512, is still more direct authority to the point that the original beneficiary cannot avail herself of her own misconduct to allege that the insured did not comply with the requirements of the association.

There must be a decree awarding one-third of the fund to defendant Cappella, and the residue to the defendant Julius Kratzsch, with costs against Miss Cappella.

II. ASSIGNMENT.

a. Fire Insurance.

WILSON *v.* HILL.

3 MET. 66. — 1841.

[*Reported herein at p. 1.*]

HALL *v.* NIAGARA FIRE INSURANCE CO.

93 MICH. 184. — 1892.

ACTION upon a fire policy issued to Hough in 1888, for three years, upon a house built upon land which he held under a contract of purchase. May 14, 1889, Hough contracted in writing to sell "lot 7," upon which this house was built, to one Stevens, for \$3,500 upon monthly payments of \$25. Stevens went into possession at once and occupied the premises at the date of the fire. The policy provided that "this policy shall become void, unless consent in writing is indorsed by the company hereon, in each of the following instances, viz.: * * * if any change take place in the title, interest, location, or possession of the property, (except in case of succession by reason of the death of assured), whether by sale, transfer, or conveyance, in the whole or in part, or by legal process or judicial decree; or if the title or possession be now or hereafter become involved in litigation; or if this policy be assigned or transferred before a loss."

In March, 1890, and before the fire, Hough assigned all his interest in his original contract of purchase, to Hall, the plaintiff. At the time of that assignment, Hough assigned the policy to Hall, and Hough and Hall went together to the office of defendant's agent.

Hall told the agent that Hough had "assigned his interest in the property" to him (Hall), and that he "wanted the policy to read payable to him in case it should burn," and thereupon the consent of the company was indorsed upon the policy. The court below directed a verdict for defendant. Plaintiff appeals.

MCGRATH, J. — * * * The record presents two questions: (1.) Was this contract valid at its inception? (2.) Conceding that the policy was vitiated by the Stevens contract as to Hough, what was the effect of the company's consent to the assignment to plaintiff? [*The court here discusses the first question and gives an affirmative answer to it.*]

The other question is the more serious one, and one upon which the authorities are by no means uniform. In *Insurance Co. v. Munns*, 120 Ind. 30, 22 N. E. Rep. 78, the assured had mortgaged the property, and afterwards sold it to Munns, and assigned the policy, to which assignment the company, without knowledge or notice of the mortgage, consented. The court held that a contract of insurance is a purely personal engagement, and does not run with the property insured, citing *Nordyke & Marmon Co. v. Gery*, 112 Ind. 535, 13 N. E. Rep. 683, and *Cummings v. Insurance Co.*, 55 N. H. 454. "That the policy expires with the transfer of the estate, so far as it relates to the original holder, but the assignment and assent of the company thereto constitute an independent contract with the purchaser and assignee, the same, in effect, as if the policy had been reissued to him upon the terms and conditions therein expressed. * * *

The contract of insurance, thus consummated, arises directly between the purchaser and the insurance company, to all intents and purposes the same as if a new policy had been issued embracing the terms of the old. In such a case, no defense predicated on supposed violations of the conditions of the policy by the assignor will be available against the assignee. Until the latter himself does some act or permits a condition of things to exist in violation of the terms of the policy, he is not in default." That, being a new and independent contract, both parties are subject to the same rules which govern the making of the original contract. A large number of authorities are cited in support of the conclusions reached. In *Steen v. Insurance Co.*, 89 N. Y. 315, the court held that the consent to the assignment created a new contract between the company and the assignee, unaffected by the forfeiture, if, in any event, it could have been insisted upon. In *Shearman v. Insurance Co.*, 46 N. Y. 526, the property was conveyed to plaintiff March 4th. The policy was renewed in the name of the grantor, March 21st, and was assigned to plaintiff, April 15th, and on the

same day the company consented to the assignment. The company insisted that at the time of its consent it had no knowledge of any fact except that at that time it was notified that the property had been conveyed to plaintiff, but the time of the transfer had not been given, nor the fact that the policy was issued after the transfer. The court held that "the renewal revived the original policy, and continued it with all the virtue which it would have had for any purpose, if it had not expired; that the consent to the assignment was equivalent to an agreement to be liable to the assignee upon the policy as a subsisting operative contract, for which agreement the retention of the premium received on the renewal was a good consideration."

In *Hooper v. Insurance Co.*, 17 N. Y. 424, the insurance was upon a stock of goods which had been sold on execution, and the purchaser obtained the consent of the company to an assignment to him, and the court held that the policy became a new contract of insurance between the underwriters and the assignee. "An assignment, therefore, being of no avail, except in case of an interest in the assignee in the subject insured, the request made to the defendant to consent to an assignment to plaintiff was of itself notice to them that he had acquired or was about to acquire an interest in the insured property. If, therefore, it was important to the defendants to know what the nature of the interest was which the plaintiff had acquired, they should have asked for information in respect to it. If they were content to give their consent without such inquiry, it was their own fault."

In *Ellis v. Insurance Co.*, 64 Iowa, 507, 20 N. W. Rep. 782, it was held that, "Although the assured may have made statements in his application which by the terms of the policy would defeat a recovery thereon by him, yet, where the insured property is sold and the policy assigned to another, and the company assents to such assignment, a new contract arises, which is not affected by the fraud of the party originally insured." In *Ellis v. Insurance Co.*, 68 Iowa, 578, 27 N. W. Rep. 762, a majority of the court held that the provision in the policy that, "if the title of the property is incumbered, the policy shall be void," was imported into the new contract, and that the existence of the mortgage invalidated that contract. The court divided upon the construction of this provision, a minority of the court holding that it was not against prior or existing incumbrances, but against those which should fall on the property subsequent to the execution and delivery of the new contract. Upon this question the dissenting opinion is in accord with the case of *Hoose v. Insurance Co.*, [84 Mich. 309].

In *Ellis v. Insurance Co.*, 32 Fed. Rep. 646, there is a very able discussion of the question by BREWER, J., who says:

"Where an assignment goes with an absolute sale of the property there is the creation of a new contract. If it is a new contract for one purpose, it is a new contract for all purposes. The assignment is expressed to be subject to the terms and conditions of the policy. What does that mean? It is equivalent to saying that the assignee takes the contract as of present writing, containing the same terms and stipulations, binding him to the same duties, and subjecting him to the same liabilities that were imposed by the contract in the first instance upon the assignor. In no other way can it fairly be said that a new contract was made. Tested by that rule, the assignee agreed, as the assignor, had agreed, in the first instance, that he would place no incumbrance upon the property, and that, if he did, the policy should fail. There is no pretense that he has violated that stipulation thus construed. It may well be doubted whether the use of the technical terms 'assignment,' 'assignor,' and 'assignee' are apt to describe the actual transaction. When the insured sells the property, that moment the policy falls. He has no insurable interest. The policy ceases to have legal force as a policy. Can it be said he is assigning that which is nothing, and that the insurance company contemplates and assents to the transfer of that which has no legal existence? * * * This is a practical question, and we must look at these matters in a practical light. When the purchaser buys the property, naturally the thought in his mind is insurance. It being his, and the old policy being dead, he looks for insurance. He finds a policy which had been in force, dead because of his purchase and cessation of the insurable interest in the assignor, yet which the insurance company is willing to have transferred to him. Would it not be an injustice to him if, after the insurance company has consented to that transfer, it could turn back to acts done by the person from whom he obtained the policy, and claim that those acts vitiated the whole thing, and rendered it not liable to the assignee? * * * But it is said there is really no consideration for this contract on the part of the company. * * * The assignment of this policy is an assertion, practically, by the assignor of a right to an unearned premium, and the claim of such unearned premium, presented to the assignee, is assented to by the company when it consents to the assignment. It matters not that there may have been no actual right to such unearned premium, for the recognition and compromise of a claim is consideration. Further than that there would be the injury to the assignee as well as the benefit to the insurer to be considered.¹ Again,

¹ "It is hard to see how the person originally insured has any claim upon the insurance company for a return of the premium paid for a term not yet expired. Apart from any special agreement for the return of premium, his claim will rest entirely upon a failure of consideration; and there has been no failure of consideration here, either partial or total. The contract in favor of the insured still exists after the assignment of the property, and if subsequently any interest in the subject-matter of the insurance becomes vested in the insured during the continuance of the policy the insured will be protected from any loss to his interest. Yet the suggestion, that the exemption of the insurer from further liability to the vendor is a sufficient consideration for the new promise.

it is said that there can be no waiver without knowledge; that the insurance company was ignorant of the fact of this incumbrance; and therefore it should not be held to have waived its rights. There may be estoppel without knowledge. * * * This consent to the assignment, dealing with things in a practical way, must be construed as a statement by the insurance company that it recognized that policy as a valid instrument. Surely it would be unjust to think that the insurance company put itself into the position of assenting to the transfer of a policy, which had no validity, going through the form of consenting to that which had no legal existence, and was worthless. These considerations, although we concede that the question is one of not perfect transparency, lead us to the conclusion that this assignment must be taken, in the language of the text-books and the authorities, to create a new contract between the assignee and the insurance company, — a new contract embracing, as of present writing, the same terms and stipulations as were embraced in the contract originally written between the assignor and insurer. 2 May, Ins. § 378; Wood, Ins. §§ 110, 366; Fland. Ins. 484; *Cummings v. Insurance Co.*, 55 N. H. 457; *Wilson v. Hill*, 3 Metc. (Mass.) 66; *Flanagan v. Insurance Co.*, 25 N. J. L. 506; *Pratt v. Insurance Co.*, 64 Barb. 589."

may afford an explanation of this question. It is apparent that this explanation depends entirely upon principles of novation. The argument is that the old obligation to the vendor is released in consideration that the insurer incurs a new obligation to the vendee. The writer is unable to see how this doctrine of novation can be justified upon any principles of the common law. It is clear that it violates a fundamental principle in regard to consideration, viz., that the consideration must move from the promisee. In the present case, the promisee suffers no detriment and makes no change of position at the request of the promisor, and he has given nothing to the insurer for the benefit of the promise, so that from him there is no consideration. Furthermore, the circumstances of the transaction will hardly justify this view, even if the doctrine of novation be admitted. In their bare detail they amount to this. The property insured is sold, and the policy is handed over either with or without a written assignment. The policy is then taken by the assignee to the insurance company, and they consent to the assignment. It is sometimes customary for the assignment and the consent to be in writing and then the consent is usually indorsed on the policy. Nothing more is done, and it is difficult to see how these facts can be construed to mean a surrender of an old obligation and the issue of a new one, — particularly as the same obligation is reissued which was issued in the first place. But in policies like that which was transferred in *Fogg v. Middlesex Mutual Fire Insurance Co.*, [10 Cush. 337], there is a condition that the policy shall be void if the property be assigned. In most cases the property is assigned before the consent of the insurer is obtained, and this condition is broken, therefore, before the consent of the insurer to the assignment is obtained. The obligation of the insurers, therefore, is avoided, and hence there is no legal obligation which can be surrendered in return for the new obligation; and yet the assignment is perfectly effectual against the insurance company. *Shearman v. Niagara Fire Insurance Co.*, 46 N. Y. 526. See *Stein v. Niagara Ins. Co.*, 61 How. Pr. 144; *Hooper v. Hudson R. F. Ins. Co.*, 17 N. Y. 424." — Chauncey G. Parker on "The Nature of a Policy of Insurance with Regard to its Assignability," in 1 *Har. Law Rev.* 388, 390.

An insurance policy is a personal contract of indemnity. It is non-assignable, except with the assent of the insurer; nevertheless the assignment of policies of insurance is an incident of nearly every transfer of personal property or improved real estate. Unexpired policies, before loss, have, as a rule in the hands of the person to whom issued or his assignee, a certain face value, which is the unearned premium or indemnity to the assignee for the unexpired term. They are either transferred as a part of the consideration for the purchase money, or the value of the unearned premium is agreed to be paid in consideration of the assignment. The assignee acquires the right to the unearned premium, or the right to the indemnity for the unexpired term for value. The right to the unearned premium may be subject to the conditions of the contract, for he takes that right subject to the consent of the company. But suppose that the unearned premium is paid over to the assignee of the policy, or credited upon the premium for a new policy, could it be contended that the company would have the right to recover back the sum so paid or credited from the assignee? The company, in such case, recognizes the validity of the policy, and the assignee is simply reimbursed for what he has paid to the assignor. The ordinary railroad mileage ticket is not transferable, and attached is a condition that its use by any other person will operate as a forfeiture. Suppose that A. hold such a ticket, which he desires to transfer to B., and they go together to the office of the railroad company, and A. transfers the ticket to B., and the company indorses its consent, B. paying the value represented by the unused strip for the transfer. Could the railroad company be afterwards heard to say, as against B., that A. had, before the transfer, forfeited the contract, even though it had no knowledge of the breach, and therefore the contract was void as to B? Certainly not. By consent, a new contract between the company and B. is created. The company has agreed with B. that the unused coupons are good in his hands. The company cannot be said to have waived that which it had no knowledge of, but it has waived the right as against B. to insist upon A.'s infirmities, whatever they may have been. The contract which, prior to the transfer, was personal with A., has ceased, and has become personal with B. B. does not agree that A. has not violated its provision, but only that he will not. Insurance contracts are peculiar, and hence rules applicable to other contracts are applicable to them only so far as the provisions are analogous.

When a party to a non-assignable instrument, representing upon its face an unearned value, consents to its transfer without res-er-va-

tion, and the assignee in good faith pays value for such transfer, the party consenting cannot be heard to set up mental reservations or prior breaches which were unknown to either party. The rule applicable to the transfer of an assignable contract has no application to such contracts. The consent to the assignment imported validity. The right to withhold or grant it is for the benefit of the insurer. It has its burdens as well as its advantages. The application for consent is, in effect, one for a contract of indemnity to the assignee. It affords an opportunity to the company to examine the risk, or to inquire as to the title or interest to be insured, or as to whether there had been any other change in risk or title. Had defendant done so, and refused its consent, plaintiff would have been in a position to retain or recover the consideration paid, and to seek indemnity elsewhere. It is too late now, after the loss, to set up the changed conditions. It may be said, too, that at the time of the application for the consent of the company to the assignment, plaintiff informed the company that Hough had assigned his interest in the property to him. That was sufficient, of itself, to put the company upon inquiry.¹

Defendant insists, further, that, inasmuch as plaintiff had commenced proceedings against Stevens before a Circuit Court commissioner, to recover possession of the premises, the policy was invalidated thereby. The policy contained a provision that, "if the title or possession be now or hereafter become involved in litigation," the policy should become void. Stevens was clearly in default, having occupied the premises for twelve months, and paid but \$75, whereas he had agreed to pay \$25 per month. Plaintiff had declared the contract under which Stevens occupied void, as he had the right to do under the contract. From that moment Stevens became and was a tenant holding over without permission. The proceeding to recover possession was predicated upon these provisions of the con-

¹ Judge Hare, in his notes to 2 Amer. Lead. Cas. (5th ed.) 888, criticises the accepted doctrine as to the formation of a new contract between the assignee and the insurer. He says that this explanation of the transaction is "at variance with the main current of authority which establishes that the assignee claims through and under the assignor, and is subject to every defense that would be good against him;" that the explanation "is, moreover, inapplicable to the assignment of a marine policy, which does not require the assent of the insurers, and is manifestly a transfer of the old, and not the creation of a new contract." He suggests that "if the policy be interpreted as a contract for the benefit, not only of the insured, but of those who claim under him subsequently, as purchasers, the necessity for resorting to a new contract will disappear, and there will be no difficulty in adjusting the rights of the parties on their true basis."

tract. It cannot be contended that the provision of the policy referred to contemplated that, in the event that proceedings were instituted to oust a tenant, the policy should become void. This provision, taken in connection with the other provisions of the policy, clearly relates to a litigation over the title or possession of the assured. The judgment must be reversed, and a new trial had, with costs of this court to the plaintiff. The other justices concurred.

ILLINOIS MUTUAL FIRE INS. CO. v. FIX.

53 ILL. 151. — 1870.

LAWRENCE, J. — The appellee, Fix, being indebted to Mayer, for whose use this suit is brought, executed to him his notes, secured by mortgage on a brewery, and at the same time assigned to him a policy of insurance, issued by the appellants, upon the building and fixtures. This assignment was made with the consent of the company indorsed upon the policy. The present suit was brought in the name of Fix for the use of Mayer, and resulted in a verdict and judgment for the plaintiff, from which the company appealed. On the trial, the company offered to prove that the building was set on fire by the plaintiff, Fix. The evidence was objected to by plaintiff's counsel, and the objection was sustained. This ruling presents the main question in the case, to wit, whether, where a policy of insurance has been assigned by the assured to one holding a mortgage on the premises, with the consent of the company indorsed upon the policy, its validity can be destroyed by acts done by the assignor in violation of its conditions.

This question has received much discussion in the courts of New York, and the decisions first made have been deliberately overruled. It was first held, in *Insurance Co. v. Robert*, 9 Wend. 404, that no act of the assured, after the assignment of the policy with the consent of the company, can impair the rights of his assignee. This case was approved and followed in *Tillon v. Insurance Co.*, 5 N. Y. 406, the court holding that the assignment of a policy, with the assent of the insurer, creates new and mutual relations and rights between the assignee and the insurer, which cannot be impaired by a third person, over whom the assignee has no control. The question again came up in *Grosvenor v. Insurance Co.*, 17 N. Y. 392, and in *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.*, Id. 401. In the first case the policy was not assigned by the mortgagor to the mortgagee, but, by its original terms, the loss, in case of fire, was

made payable to the mortgagee. The majority of the court held the case was not distinguishable from an assignment of the policy, and, overruling the cases already cited, held the policy was avoided by certain acts done by the mortgagor in violation of its terms. One of the eight judges composing the court dissented altogether, and two others concurred only on the ground that the case was not like one in which the policy had been assigned. In the other case, decided at the same term, and which was one of assignment, the majority of the court held the policy avoided by the acts of the assignor, the three judges dissenting.

In these two cases, the question involved received a much fuller discussion than was given to it when the former decisions were rendered. In reply to the argument of the court in 9 Wend. that the assignor could not be permitted to execute a release to the insurance company which would impair the rights of the assignee, and that he should not be permitted to do indirectly what he could not do directly, the court very justly say, this argument fails to distinguish between acts done for the purpose of discharging a liability, and acts which, by the terms of the contract, were necessary to be done or omitted, in order to continue the liability in force. The principle, however, laid down in the case in 5 N. Y. that the assignment of a policy, with the assent of the company, creates new relations and rights between the assignee and the company, is not wholly repudiated as never applicable, for it is admitted that, in cases where there has been an absolute sale of the insured property, the assured retaining no interest in it, and there has been an assignment of the policy to the purchaser, with the consent of the company, such purchaser may be considered as becoming a party to the contract, taking upon himself the performance of its conditions, while the assignor, ceasing to be a substantial party, and having no interest in the subject-matter, could do no act affecting the rights of the assignee. The court insist, however, that this principle cannot be applied to an assignment to a mortgagee, because, in such cases, the mortgagor retains his interest in the property and in the policy, and whenever the mortgage debt is paid, the benefit of the policy reverts to him, or in case the policy exceeds the amount of the mortgage, the surplus, in the event of a loss, would be payable to the mortgagor. The court further say, that the rule of the former cases would make insurance companies liable for risks which they never assumed, and against which their policies are intended to guard them, for, under this rule, a mortgagor, remaining in possession, might convert a building, insured as a dwelling-house, to a use vastly more hazardous, as by making it a place for manu-

facturing fireworks, and still the company be required to pay, although one of the material terms of its contract was that its liability should cease in the event of such a change in the uses of the property. The Supreme Court of Pennsylvania, in *Insurance Co. v. Roberts*, 31 Pa. St. 438, adopts the rule of these cases, in a well considered opinion. The Supreme Court of the United States in *Carpenter v. Insurance Co.*, 16 Pet. 495, lays down a similar principle. This rule is also followed in *People v. Resolute Ins. Co.*, 17 Wis. 378. On the other hand, the earlier New York cases were followed in *Pollard v. Insurance Co.*, 42 Me. 226.

In this State the question is an open one. Counsel for appellee cite *Insurance Co. v. Wetmore*, 32 Ill. 242, and *Insurance Co. v. Marks*, 45 Ill. 482, as adopting the rule of the earlier New York cases. But in the first of these cases, the policy was issued directly to the mortgagees, and assigned by them with the note and mortgage, and the question, in regard to which the case in 5 N. Y. was cited, was as to the right of the assignee to bring suit in the name of the assignors. In the case in 45 Ill. the assured had sold the stock of goods insured, and the policy had been assigned to the purchaser with the consent of the company. The court, in its opinion, cites the earlier New York cases only, but even under the rule laid down in the last case, in 17 N. Y., the assignee was entitled to recover, the transaction being a sale and not a mortgage.

This court has shown, in various cases, a disposition to hold insurance companies to a full measure of responsibility, but we are of opinion that the cases in 17 N. Y. stand upon the better reason. The consent of insurance companies to an assignment of the policy by a mortgagor to a mortgagee, should not be construed as imposing upon them, as a consequence of such mere naked assent, a liability which they never would intentionally assume, and against which they take all possible pains to guard themselves, and must guard themselves in order to preserve their solvency. The principle contended for by counsel for appellee, and laid down in the earlier New York cases, is, that no act of the assignor, done without the consent of the assignee, can invalidate the policy, so far as relates to the assignee. If this be true without limitation, then, as said by the New York Court of Appeals, a risk taken by a company at the lowest rates, because in the least hazardous class, might be changed, by the mortgagor remaining in possession, and without the concurrence of the mortgagee, to the class of extra-hazardous, and the liability of the company would remain the same. A detached dwelling-house might be converted into a powder magazine, or to some other use which would prevent any sound insurance company from

taking the risk on any terms, and still, under the rule claimed by appellee, the company would remain responsible. The mortgagor might go further, and not only convert his building to extra-hazardous uses, but absolutely set it on fire, with a view of defrauding the company, as the appellants offered to prove was done in the present case.

We cannot adopt a rule which would lead to such results. In analogy to the case of absolute sales by the assured, we should be much inclined to hold to the rule announced in 5 N. Y., if it were possible to separate the interest of the mortgagor and mortgagee. But it is not, for the mortgagor is not only interested in the payment of the mortgage, but, where he pays the premium, the fruits of the policy absolutely belong to him, subject to the lien of the mortgage. Where there is an absolute sale, there is no difficulty in determining the measure of the assignee's rights and the company's liabilities, for he stands in the position of receiving a new policy as owner, and becomes responsible for any extra-hazardous uses to which the building may be applied, a responsibility he cannot evade on the ground that the building is not under his control.

But where there is no sale, but the policy is merely assigned as security, we are obliged to hold, either that the company is bound absolutely to the assignee, no matter how far the conditions of its contract may have been violated, which would be a very unreasonable ruling, or that there is such identity of interest in regard to both the property and the policy, that there can be no recovery, even for the use of the assignee, if the assignor fails to comply with the conditions.

The utmost that can be claimed for an assignee in such cases is, that he should stand in the same position as if he had taken out a new and independent policy to protect his own interest as mortgagee. But admitting such claim, we have no rule to guide us. It is impossible for us to say what conditions the company would deem it necessary to insert in such a policy for its own protection. It is very certain it would stipulate that the hazard to the building should not be increased, and thus would compel the mortgagee to take upon himself the responsibility of the mortgagor's acts, from which he could not escape by saying that his rights should not be prejudiced by the acts of a third person. It would necessarily result, from the nature of the interest insured, that its owner might be damnified by the acts of the mortgagor in possession, although beyond his control. Whether a company would also stipulate, in such a policy, that neither the mortgagor nor the mortgagee should

obtain further insurance, without its consent, we do not know, though it is evident such a stipulation would be a wise precaution.

The history of the *Robert Case*, in 9 Wend. singularly illustrates the injustice of attempting to base a judgment against an insurance company, in favor of the mortgagor, upon the equities of his assignee. In that case, the judgment was rendered in favor of Robert, the mortgagor, for the use of Bolton, his assignee, on the ground that, though Robert had violated the policy, this could not prejudice Bolton. After the rendition of the judgment, and before its payment, Robert paid off the mortgage, and threatened the insurance company with an execution. The company moved the court for a perpetual stay, which was granted, the court holding, consistently with its former ruling, that Robert had no equitable rights under the policy. 9 Wend. 404 and 474. From this order an appeal was taken to the court for the correction of errors, and that court held, as the original judgment was unreversed, it was conclusive upon the rights of the parties, and, as the mortgage had been paid, the benefit of the judgment reverted to Robert, the mortgagor. He thus received the full benefit of the policy, although he had forfeited all rights under it, and a judgment had been rendered in his favor only in consequence of the equities of his assignee. 17 Wend. 631.

It is, in our opinion, very clear, if we attempt to dispose of cases of this character on the theory that the assignment is to be treated as a new policy, issued directly to the mortgagee, for his exclusive benefit, and to adjust the rights of these parties in accordance with what we may suppose such a policy would contain, we shall be wandering in a labyrinth where there would be but one thing certain, and that is, that great injustice would be done these companies. We should practically be enforcing liabilities against them which they never intended to incur, and giving to the mortgagor the benefit of a policy in which he has forfeited all his rights. We deem it safer and more just to say, that where a policy is assigned as collateral to a mortgage, though with the consent of the company, the assignee takes it subject to the conditions expressed upon its face, or necessarily inhering in it, and that no recovery can be had merely in consequence of the equities of the assignee, if the assignor has lost the right to recover by violating the terms of the contract.

The evidence, offered to show that the plaintiff set the building on fire, should have been admitted, and the instruction asked for defendants, in regard to the effect of a second insurance, should have been given.

Judgment reversed.

b. Marine Insurance.

WAKEFIELD *v.* MARTIN AND TRUSTEES.3 MASS. 558.¹

WILLIAM C. MARTIN, being indebted to James Scott in the sum of \$5,000, and having shipped a parcel of goods on board the ship —, upon which he had effected a policy of insurance, in order to secure Scott, assigned the bills of lading and the policy to him by a blank indorsement. A total loss happened. The plaintiff, a creditor of Martin, summoned Welles, one of the underwriters, as trustee of Martin; Welles having no knowledge of the assignment to Scott. The question was, whether this assignment to a creditor, without notice to the underwriters, was good so far as to vest a property in the assignee, and thus preclude an attachment.

Mr. Parsons, for Scott, contended that the assignment was good and perfect between the assignor and assignee, and vested an equitable right in the latter; and although, if the underwriters had actually paid the loss to Martin without notice of the assignment, they would have been discharged, yet that an attaching creditor was in no better condition than the assignor himself.

Mr. Ames, for the plaintiff, contended that a policy of insurance was not assignable; that it was a mere *chose in action*, and by law no property vested in the assignee; that the assignor might revoke the authority, or might release and discharge the underwriters; that the attaching creditor stepped in with the authority of the law, and effected this revocation; and that a contrary doctrine would introduce great frauds.

THE COURT, after taking time, pronounced their opinion *unanimously*, that the assignment, though without the knowledge or assent of the underwriter, vested an equitable right in the assignee; and, therefore, they discharged the trustees.²

¹ No date; probably about 1800.

² "It is only by force of the special clause, prohibiting an assignment of the interest of the assured in the policy, or in the property insured, without the consent of the insurers, that a forfeiture of the policy is claimed to have occurred. In the absence of such provision, an assignment of property and policy, in marine insurances (however it may be in regard to fire policies), is valid, and the policy remains in force for the benefit of the assignee, although there is no notice of the assignment given to the insurers. *Wakefield v. Martin*, 3 Mass. 558; *Earl v. Shaw*, 1 John. Cases, 313; *Powells v. Innes*, 11 M. & W. 10; 3 Kent's Com. 261-275; 2 Am. Leading Cases, 1st ed., 309-314." — *Hitchcock v. Ins. Co.*, 26 N. Y. 68, 69.

POWLES AND OTHERS *v.* INNES.

11 MEESON & WELSBY, 10. — 1843.

[Reported herein at p. 5.]

c. Life Insurance.STEINBACK *v.* DIEPENBROCK.

158 N. Y. 24. — 1899.

THIS action was brought to recover the proceeds of a certain policy of insurance for \$10,000, issued on the life of Alois Diepenbrock, appellant's testator, by the Equitable Life Assurance Society of the United States. The amount due thereon was claimed, on the one hand, by the plaintiff as assignee, and, on the other hand, by the defendant Louise Diepenbrock, as executrix of the estate of Alois Diepenbrock, deceased. The plaintiff brought suit against the insurance company to recover the amount due upon the policy. The company, admitting its liability to some one, paid the money into court and procured the defendant Louise Diepenbrock, as executrix, to be substituted as defendant, together with William Erdtmann, the original assignee of the policy, who had assigned it to the plaintiff. Further facts are stated in the opinion.

PARKER, Ch. J. — The counsel for the appellant in his argument insisted with great earnestness and force that the position several times asserted by this court in support of the legality of the assignment of a policy of insurance to a person having no insurable interest in the life of the insured, is a mistaken one and in conflict with the decisions of the United States Supreme Court and the court of last resort in many of the States.

Warnock v. Davis, 104 U. S. 775; *Franklin v. Hazzard*, 41 Ind. 116; *Missouri Co. v. Sturges*, 18 Kan. 116; *Schoenfeld v. Turner*, 75 Tex. 334; *Bayse v. Adams*, 81 Ky. 368, and *Helmetig v. Miller*, 81 Ala. 183, furnish support for his assertion as to the rule in the United States Supreme Court and in some of the other States. Supported by these authorities, the counsel challenged the correctness of the rule that concededly has been long acquiesced in in this State by the courts and the profession. Indeed, Mr. Justice Field in his opinion in *Warnock v. Davis*, *supra*, stated the rule in this State to be that a valid assignment of a policy of insurance could be made to a person without interest in the insured. But the appellant contends that, while this may be the rule here, the decisions in other jurisdictions demonstrate that our position is wrong as a matter of

sound public policy, and, therefore, the true rule should be laid down, notwithstanding that expressions inducing the belief that the above rule obtained may have been made by our courts. It is urged that this task will not be a difficult one for the reason, as the appellant contends, that there have been no cases in this State where the question was necessarily up for decision, and, therefore, all that has been said upon that subject by this court is mere dictum.

In *St. John v. Am. L. I. Co.*, 13 N. Y. 31, a recovery in favor of the plaintiff against an insurance company was sustained where it appeared that one Noyes had effected policies of insurance upon his own life and shortly afterwards assigned them to the plaintiff for a valuable consideration. In the answer the defendant alleged, by way of defense, that the plaintiff was entitled to recover only the amount of money that he had advanced as a consideration of the transfer of the policy to him, and that if defendant was liable beyond such amount upon the policy, the personal representatives were interested in the excess, and, therefore, necessary parties to the suit. And upon the close of the evidence the counsel for the defendant pressed the point that the plaintiff had no insurable interest in the life of the insured, and, therefore, was not entitled to judgment. The court regarded the question as one necessary to be passed upon in the final disposition of the case, and after considering it, held that the policies in question were valid in their inception and that the assignment of them to the plaintiff did not affect the liability of the company, and that to entitle the assignee to a recovery it was not necessary for him to have had an insurable interest in the life of the insured.

The next case was *Valton v. N. F. L. A. Co.*, 20 N. Y. 32, where Schumacher obtained a policy on his life for \$10,000, and by his articles of copartnership agreed that the plaintiff and another partner should become the owners of the policy and all due thereon in the event of his death before the termination of the partnership. This contingency happened, and the court held that it operated to vest absolutely the title to the policy in the plaintiff and his other partner and a recovery could be had thereon as against the defendants.

It will be observed that in the cases cited the contest was between the assignee and the company issuing the policy, and the question was not squarely presented whether, as between the assignor and the assignee, the assignee would be entitled to retain more than the sum actually invested by him, which is the rule in some jurisdictions. But it necessarily was decided that the policy was not rendered invalid by the assignment, and further that the assignee

acquired thereby the right to enforce collection of the full amount of the policy from the company.

In *Olmstead v. Keyes*, 85 N. Y. 593, the plaintiff, having obtained the proceeds of a policy of life insurance, brought an action for the purpose of ascertaining and determining the conflicting claims of various defendants to the moneys paid on the policy. It appeared that Keyes procured a policy of insurance on his life, payable to the plaintiff as trustee for his wife Huldah; Huldah died intestate a few years later; afterwards Keyes married again and thereupon the plaintiff for value assigned the policy to Keyes' second wife at his request. Keyes subsequently died intestate, leaving him surviving his widow and one child by her and several children by his first wife. It was held that during the life of the first wife the policy was her property; upon her death the title vested in her husband as survivor, and he having caused it to be assigned to his second wife, the assignment vested the title in her and she alone was entitled to the money due thereon. There was a difference of view in the court as to the disposition of the case, and the argument that led to the decision considered with care the assignability of a policy of life insurance like any other contract; in the course of the argument the court referred to and considered many authorities in England and in this country and reached the conclusion that while an insurable interest is necessary to enable one to take out a policy of insurance on the life of another, it is not necessary that the assignee of a policy validly issued should have such an interest. After careful examination of that opinion we find it impossible to reach any other conclusion than that it was intended to put at rest whatever controversy there may have been in this State touching the assignability of a valid policy of insurance. The case at bar is the only one we know of where the rule laid down in the case last referred to has been seriously questioned, although it is true that some discussion of the principle was had in *Wright v. M. B. L. A. of A.*, 118 N. Y. 237, where the defendant unsuccessfully challenged the right of the assignee to recover on the ground, among others, that the plaintiff had not an insurable interest in the life of the insured at the time of the assignment; the court in its opinion cited the case of *Olmsted v. Keyes*, *supra*.

The result of our further examination persuades us that what has been understood to be the rule in this State is not only in line with the authorities in most jurisdictions upon that subject, but is sound as a matter of public policy. It was formerly the rule in England that while a policy of insurance could not be assigned at law it could in equity. By the act of 1867 (30, 31 Vict., c. 144) a policy

of life insurance was made assignable at law, and in some of the decisions it was said by the court that the object of the statute was to enable the assignee to sue in his own name; but it did not in any other way improve the position of the assignee, who could before that secure the money in equity. *B. E. I. Co. v. T. W. R. Co.*, 38 L. J. Ch. 132; *In re Turcan*, L. R. (40 Ch. D.) 5.

The rule asserted by this court has also been held to be the law in many of our sister States in a number of cases where the question has been raised either in actions brought by personal representatives of the assignor to recover the money received by the assignee on a policy, or in suits brought by the company issuing the policy for the purpose of determining whether the personal representatives or the assignee were entitled to the proceeds, all claimants being made parties defendant. *Mut. Co. v. Allen*, 138 Mass. 24; *Eckel v. Renner*, 41 Ohio St. 232; *Martin v. Stubbings*, 126 Ill. 387, 403; *Fitzpatrick v. Hartford Co.*, 56 Conn. 116; *Clark v. Allen*, 11 R. I. 439; *Murphy v. Red*, 64 Miss. 614; *Rittler v. Smith*, 70 Md. 261. These authorities are, it seems to us, well grounded in principle. They recognize not only the existence of, but the necessity for, the rule that forbids any insurance upon the life of a person, in which the person for whose benefit the insurance is made has no interest. Such a policy constitutes what is termed a wager policy, or a mere speculative contract upon the life of the insured, with a direct interest in favor of its early termination. It is, in terms, forbidden by statute in England (14 Geo. III., c. 48) and in many other jurisdictions, including this State (Laws 1892, chap. 690, § 55), and this court held in *Ruse v. Mutual Benefit Insurance Company*, 23 N. Y. 516, that such insurance is void at common law, and that the English statute, in so far as it prohibits such insurance, is merely a declaratory act. But the question we are considering presupposes a valid contract of insurance, the policy being issued either for the benefit of the assured personally, or for the benefit of some one having an insurable interest in the assured at the time of the taking out of the policy. Such a policy constitutes a contract to pay a certain amount of money to the payee on the death of the assured. It is a chose in action with all the ordinary incidents belonging thereto, and as such may be assigned either as collateral or absolutely, as the payee may elect.¹ While an insurable interest in the

¹ The general rule in New York upon the assignability of life policies is subject to modification where a wife attempts to assign a policy issued in her favor upon the life of her husband. Chap. 80, Laws 1840 (since followed by various amendatory acts and now embodied in § 22 of the Domestic Relations Law),

payee is necessary, in the first instance, to the creation of a valid contract, it is not necessary that such interest should continue. The case of a wife divorced from her husband will serve as an illustration. The policy taken out for her benefit during the existence of the married relation is not affected by a subsequent severance of that relation through a decree of a court of competent jurisdiction by which she ceases to have an insurable interest in his life. *Connecticut Mutual Life Ins. Co. v. Schaefer*, 94 U. S. 457. The materiality of the value of the interest has relation to the question whether the policy is taken out in good faith, and not as a gambling transaction. If it be taken out in good faith, then a sound public policy would seem to require that the payee should be permitted to treat it as he may any other chose in action and go to the best market he can find, either to sell it or borrow money on it. It would substantially confine him to such terms as the company issuing the policy should choose to make with him, if he should be limited in his choice of a purchaser to the party having an interest in the continuance of the life of the assured.

On the other hand, it is said that if the payee of a policy be allowed to assign it, a safe and convenient method is provided by which a wagering contract can be safely made. The insured, instead of taking out a policy payable to a person having no insurable interest in his life, can take it out to himself and at once assign it to such person. But such an attempt would not prove successful, for a policy issued and assigned, under such circumstances, would be none the less a wagering policy because of the form of it. The intention of the parties procuring the policy would determine its character, which the courts would unhesitatingly declare in accord-

provided that a wife might take out a policy upon the life of her husband, etc. By a process which seems to be an example of judicial legislation, the Court of Appeals has held that such policies are not assignable. In *Romaine v. Chauncey*, 12 N. Y. 566, 574, Judge Finch, in the course of his opinion, though merely for purposes of illustration, has epitomized the New York doctrine as follows: "Policies of life insurance in favor of the wife on the life of the husband we have persistently held to be non-assignable. *Eadie v. Slimmon*, 26 N. Y. 9. We determined that their peculiar character and purpose necessarily took from them the chief and most important characteristic of property in general. As I read the later case of *Baron v. Brummer*, 100 N. Y. 372, we distinctly held 'that such policies should not be subjected to the lien of creditors either of husband or wife; as to the former by the express words of the statute, and as to the latter by the determination of the courts.' We took from them the transferable characteristic of property as such and tied them closely to their lawful object and purpose." On the contrary, in Maryland, where there was substantially the same legislation, the court said: "We cannot recognize the decision in *Eadie v. Slimmon* as law in this State." — *Emerick v. Coakley*, 35 Md. 192.

ance with the facts, reading the policy and the assignment together, as forming part of one transaction.

Cammack v. Lewis, 15 Wall. 643,¹ and *Warnock v. Davis*, 104 U. S. 775, were cases where the policies were taken out in order that they might be assigned to the assignees, through their procurement, under circumstances that might well be held to be in evasion of the law prohibiting gaming policies.

In *Warnock's* Case the agreement touching the procurement of the policy and the use to be made of it, including the promise to assign it, was in writing, and executed the very day the policy was applied for, and the day following the assured executed an assignment of the policy, which had in the meantime been issued in pursuance of such an agreement. The insurance company paid over the money to the assignee, and the court held that the personal representatives of the assured were entitled to receive from the assignees all the money except the sums advanced by them under the agreement, plus the sum paid by them to the widow. In the opinion it is said that the assignment of the policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. That remark was clearly true as applied to the facts of that case, for the policy was taken out in pursuance of an agreement to assign it. It was, therefore, in fact a policy taken out for the benefit of parties having no insurable interest, although in form issued to the assured and by him assigned to such parties. In such case the court will always declare the fact to be as it is, without regard to the effort of the parties to hide the truth and cheat the law. But the language employed by the court, and evidently advisedly, is broad enough to cover all assignments of policies to parties not having an insurable interest, including as well those taken out in good faith and kept up as long as the financial condition of the insured permits, as those deliberately taken out for the purpose of speculation upon a life that the intended beneficiary, whether as payee in the policy or by assignment, has no interest in prolonging. The point of actual separation between the cases asserting the assignability and those asserting the non-assignability of policies of insurance to persons not interested in the continuance of the life of the assured, seems to be that those asserting non-assignability proceed on the assumption that the question is one of law, and that if a policy is not assignable in one case, it cannot be in any case; while in the other line of cases the underlying principle is that all valid contracts are assignable, but that contracts are not necessarily

¹ *Cammack v. Lewis*, is stated and discussed, *ante*, pp. 65, 66.

valid and free from the taint of gambling because upon their face they appear to be regularly and properly issued. In order to ascertain the truth all the facts and circumstances may be proved, and if it then appear that the parties intended by the contract to enable a third and uninterested party to speculate upon the life of another, the court will declare such contract invalid, not because of the assignment, but in spite of it.

Warnock's Case and this one are very wide apart in their facts and serve very well to illustrate the necessity for the position taken by the courts of this State upon this general subject.

In December, 1887, Alois Diepenbrock took out a policy of insurance on his life in the Equitable Life Assurance Society. He paid the premiums regularly down to December, 1892, a period of about five years, at which time the surrender value of the policy was about \$485. He was pressed for money and finally sold the policy to the defendant Erdtmann for \$600, or something like \$115 more than he would have received by the surrender of the policy to the company. He had paid a much larger sum in premiums, something over \$2,000, and there seems to be no good reason why a person owning such a policy and obliged to sell it, should not be permitted to get back as much as possible of the money that he has paid out for insurance. His condition of health may have changed very materially, of which fact the company can take no advantage; for in its contract it made allowance for that possibility. There is no good reason for saying that an insured person should not have the right, whenever his necessities press him because of a failing condition of health that assures a speedy death, to realize on his policy and obtain for it something like a fair price, which may, perhaps, be almost equal to its face value.

The personal representatives of the assured contested the assignment also on the ground that it was intended as collateral, although in form a valid assignment, but the Special Term found otherwise, and the Appellate Division approved that finding, so that question is no longer open for consideration.

Other questions are presented by the appellant, but after a careful examination of them we conclude that no error was committed below that will support a reversal of the judgment.

The judgment should be affirmed, with costs.

All concur, except MARTIN, J., absent.

Judgment affirmed.¹

¹ "It is well settled that a creditor has an insurable interest in the life of his debtor, but the nature and extent of this interest has become a seriously complicated question. Much of the confusion now surrounding this subject is, we

think, attributable to two erroneous views which have been entertained and announced by quite a number of the most respectable courts and judges in this country. The first is, that a contract effecting insurance upon the life of a debtor for the benefit of a creditor is not a contract of indemnity; and the second is, that the creditor's insurable interest in the debtor's life is not confined strictly to the amount of indebtedness to be secured. Before proceeding further, it may be remarked that the form in which the transaction is clothed is utterly immaterial. It makes not a particle of difference whether the policy is payable to the insured, or his estate, with an assignment to the creditor, or payable directly to the creditor as the nominated beneficiary. The real thing to be ascertained, in any given instance, is, what was the actual object of the parties; for by this test alone is the legality of what they did to be determined.

1. Our first proposition is, that effecting insurance for the purpose of securing an indebtedness is a contract of indemnity, and nothing else. We have the utmost confidence in the correctness of this assertion. Indemnity is the only logical end to be obtained by a transaction of this kind. What possible right has a creditor to be the beneficiary of such insurance except to protect himself against loss? and what is such protection, if not indemnity? Notwithstanding the fact that eminent jurists have held otherwise than as above laid down, we cannot help thinking that this is a very plain proposition, and one as to which there ought to be no serious difference of opinion." — Lumpkin, J., in *Exchange Bank v. Loh*, 104 Ga. 446. See also, upon the assignment to a creditor, of a life policy, as security for a debt, the extract from Judge Little's opinion in the same case, quoted herein at p. 66, *note*.

PART VI.

BREACH OF CONTRACT BY THE INSURER.

I. REMEDIES.

SKUDERA v. THE METROPOLITAN LIFE INSURANCE CO.

17 MISC. (N. Y.) 367. — 1896.

(SUPREME CT., APPELLATE TERM.)

APPEAL from a judgment of nonsuit rendered by the District Court, in the city of New York, for the Fourth Judicial District.

BISCHOFF, J. — The action was in *assumpsit* to recover the premiums paid upon five several policies of life insurance which were alleged to have been wrongfully forfeited by the insurer; and the judgment appealed from being one of nonsuit, the plaintiff is entitled to a construction of the evidence most favorable to her. *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389.

Observing the rule stated, the case, as developed upon the trial, was that during the years 1882 and 1883 the plaintiff effected five policies of life insurance in the defendant company, upon each of which policies she regularly paid the weekly premiums as they matured until March, 1895, amounting in the aggregate to \$165.95; and that thereafter the defendant unjustifiably assumed to forfeit each of such policies for nonperformance of a condition subsequent, to wit: The payment of premiums maturing subsequently to those actually paid.

The question which arose upon the motion of the defendant's counsel for dismissal of the complaint was solely with regard to the plaintiff's right to recover in *assumpsit*, as for money had and received by the defendant to her use, the premiums paid; and we concur in the justice's decision that the plaintiff had mistaken her remedy.

Granting that upon the defendant's breach the plaintiff could treat the contract, with regard to each of the policies, as determined, it does not follow that the defendant was bound *ex æquo et bono* to restore the premiums received by it, for which, in part, at least, the

plaintiff had had value in the risk assumed by the defendant. Plainly, the plaintiff could not predicate a rescission of the contract of the defendant's breach without restitution by her of what she had received under the contract, and a contract of life insurance being essentially indivisible in point of performance by either of the parties thereto (*Cohen v. N. Y. Mut. Life Ins. Co.*, 50 N. Y. 610), such restitution was in the nature of things impossible. Wharton on Contracts, § 748; Clark on Contracts, 774; *Hunt v. Silk*, 5 East, 783.

In a case such as the one at bar, if the insured is unwilling to await the maturity of the policy and then to test its continued vitality, only two remedies are available, the insured may either sue at law for damages for the insurer's breach of contract, or prosecute an action in equity to have the policy adjudged to be in force and the insurer to accept the premium refused. Sutherland on the Meas. of Dam., § 838; *Speer v. Phoenix Mut. Life Ins. Co.*, 36 Hun, 323; *Day v. Conn. Gen. Life Ins. Co.*, 45 Conn. 480; 29 Am. Rep. 693; *Hayner v. Am. Pop. Life Ins. Co.*, 69 N. Y. 435; *Cohen v. N. Y. Mut. Life Ins. Co.*, *supra*.

The case at bar should be distinguished from the case where the failure of consideration for the premiums paid is entire in that the risk to be assumed by the insurer under the policy never attached, the policy being avoided for noncompliance with a condition precedent, fraud, or other causes. 11 Am. & Eng. Ency. of Law, 345; *Delavigne v. United Ins. Co.*, 1 Johns. Cas. 310; *Fulton v. Met. Life Ins. Co.*, 4 Misc. Rep. 76; *Miller v. Union Cent. Life Ins. Co.*, 86 Hun, 6.

Judgment affirmed, with costs.

DALY, P. J., and MCADAM, J., concur.

Judgment affirmed, with costs.

VAN WERDEN *v.* EQUITABLE LIFE ASSURANCE SOC.

99 IA. 621. — 1896.

FROM the petition it appears that September 19, 1891, the plaintiff paid to the defendant society the sum of \$500.40, the same being three annual premiums on a \$3,000 bond or policy of insurance on his life, which policy was afterwards issued to plaintiff; that on the 19th day of September, 1892, the defendant sent to plaintiff a receipt for \$166.80, being the annual premium due on that date; that on September 19, 1893, the defendant demanded of plaintiff the sum of \$166.80, being the third annual premium on said policy, which had already been paid, and which plaintiff refused to again

pay; and that because of such refusal defendant notified plaintiff that the policy was not in force, and became suspended and avoided because of the nonpayment of the third annual premium. The petition asks to recover the amount originally paid — \$500.40 — with interest. At the close of the entire evidence plaintiff moved for a verdict in his favor, which the court directed, and from a judgment thereon the defendant appealed. Affirmed.

GRANGER, J.—* * * IV. It is urged by appellant that the plaintiff having had the insurance two years, there could be no recovery back of the entire premium paid. The court held that plaintiff, if entitled to recover, was entitled to the entire amount paid, with interest. There is a rule that, where the contract has once taken effect, there is ordinarily no law to sustain a recovery of premiums paid. *Cooke, Life Ins.*, § 104; *May, Ins.*, § 567; *Bliss, Ins.*, § 423. In support of the rule are cited *Standley v. Insurance Co.*, 95 Ind. 254; *Insurance Co. v. Houser*, 89 Ind. 258, and the same case in 111 Ind. 266, 12 N. E. 479. It is observed that the rule as stated is the ordinary one, and the cases supporting the text are generally, if not entirely, based on facts as to which there might not have been room for doubt; and the text writers from whom we quote make such distinctions as to render doubtful the application of the rule to the facts of this case. From some language in the latter case, cited from Indiana, it would seem as if the rule there stated might be doubted, as, because of its former application to the case, it is held to be the law of it. But, however that may be, we think the rule for this case quite definitely settled. In *Insurance Co. v. McAden*, 109 Pa. 399, 1 Atl. 256, the company wrongfully revoked the policy that had run for ten years. The action was to recover the premiums paid, and it was held that there could be a recovery. In that case there had been no advance premiums paid, so that the recovery was sought only for premiums covering the time when the policy had been in force. In the opinion it is said: "In the case at bar the rights of the parties under the contract of insurance had attached, but the plaintiff had never received any actual benefit from it. They may, in some sense, perhaps, be said to have enjoyed the protection which the policy afforded in the event of the husband's death; but, as that event did not occur, the policy had as yet been of no appreciable actual advantage to the plaintiff, and no real disadvantage to the defendant. The parties, for anything that appears, upon the plaintiff's recovery are placed precisely in the same situation that they were before the contract was made; for, although the company had carried the risk, and the plaintiff, Mary A. McAden, at all times during the continuance of the contract, upon the happening

of the event provided against was entitled to the indemnity it secured, yet the company has paid nothing and the plaintiffs have received nothing. As in the case of any other contract, the parties were entitled, during its continuance, according to its terms. The policy, when made, was admittedly valid; the premiums which were paid were voluntarily paid upon the policy; the risk had been running for ten years; the obligations of the contract were long since in force on both sides; and it is clear that plaintiffs could not, on their own mere motion, rescind it so as to recover back the premiums paid. But if, after receiving the several premiums, the company, without right, refuses to receive further premiums as they mature, deny their obligation, and declare the contract at an end, the plaintiff, we think, may take the defendants at their word, treat the contract as rescinded, and recover back the premiums paid as so much money had and received for their use." Rescission or avoidance, properly so called, annihilates the contract, and puts the parties in the same position as if it had never existed. And notice that a party will not perform his contract has the same effect as a breach. The latter proposition is supported in *Ballou v. Billings*, 136 Mass. 307. For the purposes of the question we are considering, the case at bar does not differ, in any essential fact, from the Pennsylvania case. In *McKee v. Insurance Co.*, 28 Mo. 383, it is said: "If the defendant [the company] wrongfully determined the contract by refusing to receive a premium when it was due, then the plaintiff had a right to treat the policy as at an end, and recover back all the money she had paid under it." In *Insurance Co. v. Garmany*, 74 Ga. 51, it is said that, if the assured makes defaults in his payments, he forfeits all his payments, with the interest that would have accrued thereon from the time of payment. It then holds that when the company violates the conditions of its contract it is liable to return to the assured as much as he (the assured) would lose because of the breach of the contract. The case holds that, where the company violates its policy, the assured may recover the premiums paid, with interest. The case cites *Insurance Co. v. McAden* and *McKee v. Insurance Co.*, *supra*. The rule of those cases has a clear support in *Meade v. Insurance Co.*, 51 How. Prac. 1. That such a rule has ample support on authority is hardly to be doubted. The case at bar, in its facts, is clearly within the rule.

It is urged that the act of the company in avoiding the policy could not affect the right of plaintiff thereon if the facts did not justify the avoidance. That may be true as a legal proposition, but it is held in *Insurance Co. v. McAden*, *supra*, that the assured in such a case may take the insurance company at its word, and treat the

contract as rescinded. The authorities sustain the rule that in such a case the assured may elect whether to enforce the contract or treat it as rescinded, and recover for the breach. The judgment of the District Court is affirmed.

2. MEASURE OF DAMAGES.

BARNEY *v.* DUDLEY.

42 KAN. 212. — 1889.

ACTION for damages for conversion of a life insurance policy.

CLOGSTON, C. — The motion for a rehearing is denied; but, inasmuch as this case goes back for a new trial, it is thought better to establish the rule or measure of damages the plaintiff is entitled to if she should recover. The plaintiff had, before the conversion of this policy, paid in as premiums \$803.60. This included fourteen semi-annual premiums of \$57.40 each. Now, to establish this sum as the plaintiff's measure of recovery, with interest, would be to allow the insured free insurance during the seven years in which premiums have been paid. This rule would not be a correct one, for the insured would have paid no consideration for the insurance during that period of time. The general rule is, as between the insured and the insurance company, when the company's business is wound up, or a policy is cancelled, where an action is brought for damages, that the measure of damages is the difference between the rate of premium paid for the old insurance and what another company of equal credit and standing would charge to issue a new policy on the same life, and the difference in the rates of premium calculated upon his expectancy of life. This is upon the ground that the insured is placed in as good a condition as he was before his policy was cancelled. This seems just and equitable. *People v. Life Ins. Co.*, 78 N. Y. 114; *Bell's Case*, L. R. (9 Eq.) 717; *Life Ins. Co. v. Binford*, 78 Va. 103; *Phoenix Ins. Co. v. Baker*, 85 Ill. 410. But it is claimed that this rule is not an equitable one as applied to the facts of this case. It is shown here that Barney, by reason of ill-health, is now non-insurable. This, then, presents a different question, a question that has been discussed in many courts, and always a conclusion reached with doubts as to its correctness. The rule above stated we think not equitable as applied to this case, for this reason: The insured, at the time of taking the insurance, does it upon the thought and reason that disease and sickness are likely to happen to him. Insurance would be effected upon few lives, we

think, if the insured was certain that no such mishap would overtake him, and that only by old age would death come; and insurance companies insure each individual with this in view. The premiums are figured upon a contingency of accident, sickness, and premature death, and now to apply this rule to this case would leave the plaintiff robbed of a part of the contract against accident and premature decay. *Holdich's Case*, L. R. (14 Eq.) 79.

Again, to establish a rule that would make the tables of mortality the only evidence of the number of premiums the plaintiff would be compelled to pay, and deduct these premiums from the face of the policy, would practically deprive the plaintiff of the very thing that insurance was taken to guard against, and plaintiff would recover no benefit by reason of the ill-health of the insured which prevents reinsurance. This general rule is held to apply to both classes in the case of *People v. Life Ins. Co.*, 78 N. Y. 114; but that was a case where the insurance company was going out of business, and was closing up its affairs, and the court established that general rule in that case because of the impossibility and impracticability of ascertaining the state of health of each person holding a policy therein. The defendants in this case stand upon a different footing from the insurance company in that case. Here the insurance company is still carrying the policy, and the defendants will receive the benefit from it. They have elected to appropriate and withhold this policy from the plaintiff, seeking to pay the premiums, and finally to recover at the death of Barney. When they place themselves voluntarily in this position, they cannot complain if the strongest rule is held against them.

It is said in *People v. Life Ins. Co.*, *supra*: "But the health of the policy-holder may since his insurance have become so impaired that his life is not now reinsurable, and hence in his particular case the value to be arrived at upon this basis (speaking of the general rule) would not be the measure of his damage." So we think as applied to these defendants the rule ought to be such as will give the plaintiff the full value of the policy at the time of its conversion, with interest. How to arrive at this value, as we said before, is a difficult question — one surrounded with uncertainties, depending upon the opinions of persons or insurance companies; but, as before said, the defendants voluntarily assumed the risk, and they cannot complain. We therefore think the general rule above stated applicable to this case, with the modification, that if Barney is not insurable by reason of ill-health or accident, that fact may be shown to reduce his expectancy. It may also be shown by experienced and expert insurance men that by reason of the ill-health of the insured a

greater rate of premium would be required to reinsure him on account of the shortened expectancy of his life. All these things may be given for the purpose of aiding the jury in determining his expectancy, and in this way determining the actual value of the policy at the time of its conversion; for if the insured's expectancy has been reduced, in proportion to such reduction the value of his policy has increased. It was said in *Bell's Case*, L. R. (9 Eq.) 717:

"As to the lives, it will be assumed, until the contrary is shown, that they are all in a normal state; that no other change has taken place than that which arises from the advance of age. If in addition to that, either from accident or illness, a higher rate of assurance is required, that must be added to the proof. That is one of the things which the office has assured against, and the chance of life has diminished."

See also *Speer v. Life Ins. Co.*, 36 Hun, 322.

We think the rule is fair and equitable as between the plaintiff and defendants, and therefore recommend that it be adopted.

BY THE COURT: It is so ordered.

All the justices concurring.

PART VII.

WAIVER AND ESTOPPEL.¹

I. IN GENERAL.

BECK, J., IN *VIELE v. GERMANIA INSURANCE CO.*

26 IA. I, 48. — 1868.²

III. The solution of one question will dispose of many points made by the defendant relating to the admission and exclusion of evidence, and the giving and refusing of instructions to the jury. The question is this: Can the breach of the conditions of the policy against the increase of the risk, without the written consent of the insurers, whereby the instrument became forfeited, be waived by parol or by the acts of the defendant?

The plaintiff admitted the increase of the risk by the use of a part of the building insured for the manufacture of rustic window shades, but sought to avoid the forfeiture, which otherwise would have resulted, by evidence tending to show the consent of the agent of defendant to such use, his acts and declarations recognizing the contract of insurance, after the increase of the risk, and his admission that the building continued to be covered by the policy. This evidence was given to the jury against the objection of the defendant, and the court *held*, in the instructions to the jury, that such facts, if proved, would operate as a waiver of the forfeiture and entitle plaintiff to recover. The following are among the conditions of the policy: "If the above mentioned premises shall be used or occupied so as to increase the risk, or become vacant and unoccupied, or the risk be increased by the erection of adjacent buildings, or by any other means whatever, within the control of the assured, without the assent of the companies indorsed hereon; * * * or

¹ See also cases on Insurance Agents, *post*, p. 468.

² The part of the opinion treating of the authority of agents to waive provisions of the contract is printed herein at p. 472.

if the assured shall keep upon the said premises gunpowder, or phosphorus, or petroleum, or rock or earth oils, or benzole, benzine or naphtha, or any explosive substance, or shall keep or use upon the said premises camphene, spirits, gas or chemical oils, without written permission on this policy, then, and in every such case, this policy shall be void."

The question above stated is fairly presented by the record, and is of very great importance, not only in its relation to this case, but to the business of insurance generally. We have endeavored to give it the careful and patient consideration, aided by the able argument of the counsel for the respective parties, which its importance demands.

The policy which is the foundation of this action, though a unilateral contract in form, contains covenants of the assured as well as of the underwriters, and mutual agreements of the parties. Some of these covenants on the part of the assured are in the nature of warranties and conditions precedent; others are in the nature of obligations imposed by the conditions limiting or measuring the liability of the underwriters. The covenants of the insurers are mostly, if not all, dependent upon the obligations or covenants of the insured, expressed or implied in the policy. The policy, though subscribed only by the underwriters, is evidence of the contract entered into by both parties, and binds both. 2 Parsons' Maritime Law, 27; Parsons' Mercantile Law, 404. Contracts of this character, binding the obligor upon conditions to be performed by the obligee, but subscribed only by the obligor, are not uncommon. Those for the sale of real estate are often in this form. The language used to express the idea that the obligor is not bound to perform his covenant, until the conditions imposed upon the other party are performed, or, in other words, that the obligor's covenants are dependent, is usually a recital of the conditions which are to be performed by the obligee, following with the declaration that if they are not performed, the instrument shall become void or forfeited. The policy under consideration is in this form. It declares that if the risk is increased by means within the control of the assured, without the assent of the underwriters, it "shall be void." By the conditions expressed the assured is prohibited from increasing the risk, and he obligates himself that it shall not be increased in the manner prohibited. This is his undertaking, and, as we have seen, he is bound thereby as though he had subscribed the policy. This is obvious; but a word or two more may express the idea more clearly. The underwriters obligate themselves to pay a certain sum in case of the loss of the building by fire, with the condition, how-

ever, that the risk shall not be increased in the manner prohibited. To this condition the assured assents by the acceptance of the contract, and he thus obligates himself and becomes bound by the policy, that the risk shall not be increased. If he permits it to be increased his covenants are broken. The condition which he is bound to perform is precedent to the underwriters' covenant. The underwriters are, therefore, not liable on the policy, which ceases to bind them, and to that extent the policy becomes void.

Unsound conclusions in the argument of defendant's counsel result from an improper understanding of the expression "shall be void," used in the condition above quoted from the policy. It is insisted that the instrument, by force of these words, upon the increase of the risk, became absolutely null and void. The phrases and words used to convey the idea are, "*ipso facto* void;" "dead;" "extinct;" "defunct;" "of no effect," etc., etc.; meaning thereby that the instrument has no force or effect in the sense of these terms when applied to instruments void in law, as the deeds of parties having no legal capacity to contract, or contracts against public policy, etc. But the term "void," as used in the policy, has no such meaning. It simply means that the underwriters, upon the violation of his covenants by the assured, shall cease to be bound by their covenants in the policy; and this is in accordance with the true definition of the word and its common use in like connections. The policy does not cease to have a legal existence, it is the only competent evidence of the contract it embodies, and in truth is not void except so far that the underwriters are no longer bound thereby. Neither will they be discharged therefrom unless they plead the fact that the insured failed to perform his covenants contained in the policy. Their silence would waive the default of the opposite party.

The position of defendant's counsel, which is supported by several authorities, is to the effect that upon a breach of the conditions of the policy by the assured, which would defeat recovery thereon, it becomes absolutely void — as it were, dead — and that nothing short of a new creation could impart vitality to it. This doctrine is certainly unsound when applied to other contracts; for, on the contrary, after default in the conditions by one party, the other may waive the forfeiture and treat the instrument as of binding force upon himself. No reasons can be given to except policies of insurance from the operation of this rule. The party in default cannot defeat the contract; the party for whose benefit the conditions are introduced may waive the forfeiture. It follows, therefore, that the instrument is forfeited at the option of the innocent party; and if

he waives the forfeiture, the contract stands as if no breach occurred. In *Williams v. Bank of the United States*, 2 Peters, 102, the doctrine is announced in these words: "If a party to a contract, who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispenses with, or by any act of his own prevents, the performance, the opposite party is excused from proving a strict compliance with the condition."

We conclude, therefore, that the forfeiture of the policy on account of the breaches of the conditions thereof, could have been waived by the defendant, and if waived, the policy continued of the same binding force which it originally possessed. This view is sustained by the following authorities: *Keenan v. Mo. State Mut. Ins. Co.*, 12 Iowa, 126; *David v. The Hartford Ins. Co.*, 13 Iowa, 69; *Carpenter v. The Prov. Wash. Ins. Co.*, 16 Pet. 509; *Coursen v. Penn. Ins. Co.*, 46 Penn. St. 323; *Atlantic Ins. Co. v. Goodale*, 35 N. H. 328; *Frost v. Saratoga Ins. Co.*, 5 Den. 154; *Clark v. Jones*, 1 Id. 516; *Cartwright v. Gardner*, 5 Cush. 281; *North Berwick Co. v. Ins. Co.*, 52 Maine, 336; *Warner v. Peoria Ins. Co.*, 14 Wis. 323; *Smith v. Gugerty*, 4 Barb. S. C. 614; *N. E. F. & M. Ins. Co. v. Schettler*, 38 Ill. 166; *Viall v. Ins. Co.*, 19 Barb. 440; *Ins. Co. v. Stockbower*, 26 Penn. St. 199; *Buckbee v. Life Ins. Co.*, 18 Barb. 541; *Beal v. Park Ins. Co.*, 16 Wis. 241; *Wing v. Harvey*, 27 Eng. Law & Eq. 140; *Peoria F. & M. Ins. Co. v. Hall*, 12 Mich. 202.

IV. We are next led to inquire as to the manner of the waiver of the forfeiture, whether it must be in writing or may be by parol, and what acts of the defendant will amount to a waiver. Parol evidence is not admissible to contradict or alter a written instrument, but this rule does not exclude such evidence when adduced to prove that a written contract is discharged, or that the damages for non-performance were waived, or that performance of a part of the contract was dispensed with. 1 Greenleaf's Ev., §§ 302-304; 2 Phil. Ev. (Cowen & Hill's and Edwards' Notes) 692 and note 505; 2 Starkie's Ev. 574; *Fleming v. Gilbert*, 3 Johns. 528; *Merrill v. Ithaca & Oswego R. R. Co.*, 16 Wend. 586. These exceptions to the rule, or rather the rule admitting parol evidence for these purposes, may not apply to specialties; but a contract of insurance need not be by specialty, or even in writing. It seems to be the better opinion that it may be oral only. Parsons' Mercantile Law, 403 and notes; 2 Parsons' Maritime Law, 19 and notes; *City of Davenport v. Peoria Ins. Co.*, 17 Iowa, 276; *Commercial Ins. Co. v. Union Ins. Co.*, 19 How. 321; *Baptist Church v. Brooklyn Ins. Co.*, 19 N. Y. 305. We need not, then, inquire whether a policy executed by an incorporation and attested by its corporate seal is a specialty, for the policy sued

on is not sealed by the companies, and is therefore a simple contract and not a specialty. The rule therefore will not, in this suit, exclude parol evidence for the purposes above mentioned. The cases which we will hereafter cite, in considering what acts may amount to a waiver of conditions or forfeiture on account of breaches of conditions, support this doctrine and will illustrate its application. It is argued that the condition in the policy, to the effect that an increase in the risk avoids the contract on the part of the underwriters, unless consent thereto be had in writing, implies that such consent can be given in no other way. It will be at once remarked that this restriction is itself a condition, and is just as capable of being waived or dispensed with as any other condition of the instrument and in the same way. There is nothing in the terms of this condition prohibiting its waiver. But the conditions of the policy became broken by an increase of the risk, without written consent, and there at once happened a forfeiture whereby defendant was discharged from the contract. Now, as a matter of fact, the waiver was not of the written consent, but of the forfeiture.

V. What will amount to or have the effect of a waiver of a forfeiture of the policy, or a dispensation of the performance of its conditions? The party for whose benefit a condition is introduced in a contract may determine whether it shall or shall not be enforced, and, as we have seen, may waive or dispense with its performance. It seems reasonable that the same character of evidence will establish a waiver or dispensation of conditions that is sufficient to prove the existence of a contract. An express agreement to that effect will of course be sufficient. Circumstances proving that the party treated the contract as subsisting and not forfeited, a course of dealing consistent only with that hypothesis, and acts and declarations whereby the other party was induced to believe that the condition was dispensed with or forfeiture waived, will be sufficient to preclude the setting up of the breaches of the condition as a defense to the contract of the party bound thereby. Thus the receipt of premium upon a policy after forfeiture is a waiver thereof. *North Berwick Co. v. Insurance Co.*, 52 Maine, 336; *New York Insurance Co. v. National Prot. Ins. Co.*, 20 Barb. 468; *Liddle v. Market Fire Insurance Co.*, 29 N. Y. 184; *Ames v. New York Union Ins. Co.*, 26 Id. 263; *Bochen v. Williamsburgh Ins. Co.*, 35 Id. 131; *Goit v. National Prot. Ins. Co.*, 25 Barb. 189; *Viall v. Genesee Mutual Ins. Co.*, 19 Id. 446; *Frost v. Saratoga Mutual Ins. Co.*, 5 Den. 154; *Lycoming Ins. Co. v. Stockbower*, 26 Penn. St. 199; *Wing v. Harvey*, 27 Eng. Law & Eq. 140. So the taking of an additional risk on the same policy will waive a forfeiture existing at the time for breach

of condition. *Rathborn v. City Ins. Co.*, 31 Conn. 193. The knowledge of the officers of an insurance company taking a risk upon the life of a party, that he intended to go south of a certain degree of latitude, is a dispensation of a condition that the insured should not go beyond that latitude. *Bevin v. Connecticut Life Ins. Co.*, 23 Conn. 244. The renewal of a life policy which had expired by non-payment of premium, in favor of one who at the time was sick, and so known to the officer renewing the policy, is a waiver of conditions against ill-health of the assured, which otherwise would have avoided the policy. *Buckbee v. United States Ins. & Trust Co.*, 18 Barb. 541. The following cases which illustrate the doctrine under discussion we have not space to classify or further notice in this connection: *Peoria Ins. Co. v. Hall*, 12 Mich. 202; *Sheldon v. Atlantic Ins. Co.*, 26 N. Y. 460; *Warner v. Peoria Ins. Co.*, 14 Wis. 318; *N. E. F. & M. Ins. Co. v. Schettler*, 38 Ill. 166; *Coursen v. Penn. Ins. Co.*, 46 Penn. St. 323; *Ruse v. Mutual Ben. Life Ins. Co.*, 26 Barb. 556.

It will be observed that the waiver of the condition or forfeiture, under these authorities, is not required to be supported by a consideration. In the cases where it is held that the payment of premium upon a policy forfeited for breaches of condition is a waiver of forfeiture, the payment was not made in consideration of the waiver, but for the renewal or continuance of the insurance. The waiver or dispensation is not in the nature of a contract which requires the support of a consideration, but rather of an estoppel, whereby the underwriter is precluded from denying the validity of the contract, on account of acts or admissions either recognizing it as of binding force after the forfeiture or holding out to the assured that the performance of the condition is dispensed with. It is not an accurate use of terms to say that the condition of a contract must be supported by a consideration. The contract itself must be, but the condition is a mere incident thereto, and its sufficiency, validity or force is in no way affected or dependent upon the consideration. It is true the condition may influence the parties in fixing the amount of the consideration, but the law will not, in the absence of fraud, inquire into its sufficiency, nor hold a contract invalid because a full or just value has not been received by the obligor. The case of a policy of insurance illustrates the point. The underwriter is bound thereby to pay the assured the amount of any loss by fire which may happen to his property within a certain time. The consideration of this contract is the premium received by the underwriter. The assured is bound not to permit the risk to be increased; this obligation is the condition of the policy, and with it we can associate no idea of consideration. It may enter into

the contemplation of the underwriter when fixing the value of the risk, which may be worth a greater premium without the condition in the policy, but the adequacy of the consideration, as we have remarked, is not a matter of inquiry, and the consideration itself no element of the condition. We conclude, therefore, that, as the condition is not dependent upon nor supported by the consideration, it may be waived or dispensed with even by an agreement without consideration. * * *

2. BEFORE THE POLICY IS ISSUED.

INSURANCE CO. *v.* WILKINSON.

13 WALL. 222. — 1871.

THE Union Mutual Insurance Company, of Maine, insured the life of Mrs. Malinda Wilkinson in favor of her husband. Both husband and wife, prior to the rebellion, had been slaves, and the husband came to Keokuk, Iowa, from Missouri. The company did business in Keokuk (where the application was made and the policy delivered), through an agent, one Ball, to whom it furnished blank applications. The mode of doing business appeared to have been that the agent propounded certain printed questions, such as are usual on applications for insurance on lives, contained in a form of application, and took down the answers; and when the application was signed by the applicant, the friend and physician forwarded it to the company, and if accepted, the policy was returned to this agent, who delivered it and collected and transmitted the premiums. On this form of application were the usual questions to be answered by the person proposing to effect the assurance; and by the terms of the policy it became void if any of the representations made proved to be untrue. Among the questions was this one: Question. Mother's age, at her death? Answer. 40. Question. Cause of her death? Answer. Fever. Mrs. Wilkinson having died, and the company refusing to pay the sum insured, Wilkinson, the husband, brought suit in the court below to recover it. The defense was that the answers as above given to the questions put were false; that the mother had not died at the age of forty, but at the earlier age of twenty-three, and had not died of fever but of consumption. Evidence having been given by the defendant tending to show that she died at a much younger age than forty years, and of consumption, the plaintiff, in avoidance of this, was permitted (under the plaintiff's objection and exception) to prove that the agent of the

insurance company, who took down the answers of the applicant and his wife to all the interrogatories, was told by both of them that they knew nothing about the cause of the mother's death, or of her age at the time; that the wife was too young to know or remember anything about it, and that the husband had never known her; and to prove that, there was present at the time the agent was taking the application, an old woman, who said that *she* had knowledge on that subject, and that the agent questioned her for himself, and from what *she* told him he filled in the answer which was now alleged to be untrue, without its truth being affirmed or assented to by the plaintiff or the wife. This the jury found in their special verdict, as they had the other facts, and found that the mother died at the age of twenty-three; did not die of consumption; and that the applicant did not know when the application was signed how the answer to the question about the mother's age and the cause of her death had been filled in.

In charging the jury, the court said, that if the applicant did not know at what age her mother died, and did not state it, and declined to state it, and that her age was inserted by the agent upon statements made to him by others in answer to inquiries *he* made of them, and upon the strength of his own judgment, based upon the data thus obtained, it was no defense to the action to show that the agent was mistaken, and that the mother died at the age of twenty-three years.

Verdict and judgment having gone for the plaintiff, the insurance company brought the case here on error.

MR. JUSTICE MILLER.— * * * The defendant excepted to the introduction of the oral testimony regarding the action of the agent, and to the instructions of the court on that subject; and assigns the ruling of the court as error on the ground that it permitted the written contract to be contradicted and varied by parol testimony.

The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate, and prudent in making their contracts, against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident, or mistake, or fraud, the principle has been long recognized that under proper

circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing, would, as was said in regard to the analogous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. It is upon this principle that courts of equity proceed in giving the relief just indicated; and though the courts, in a common-law action, may be more circumscribed in the freedom with which they inquire into the origin of written agreements, such an inquiry is not always forbidden by the mere fact that the party's name has been signed to the writing offered in evidence against him.

In the case before us a paper is offered in evidence against the plaintiff containing a representation concerning a matter material to the contract on which the suit is brought, and it is not denied that he signed the instrument, and that the representation is untrue. But the parol testimony makes it clear beyond a question, that this party did not intend to make that representation when he signed the paper, and did not know he was doing so, and, in fact, had refused to make any statement on that subject. If the writing containing this representation had been prepared and signed by the plaintiff in his application for a policy of insurance on the life of his wife, and if the representation complained of had been inserted by himself, or by some one who was his agent alone in the matter, and forwarded to the principal office of the defendant corporation, and acted upon as true, by the officers of the company, it is easy to see that justice would authorize them to hold him to the truth of the statement, and that as they had no part in the mistake which he made, or in the making of the instrument which did not truly represent what he intended, he should not, after the event, be permitted to show his own mistake or carelessness to the prejudice of the corporation.

If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is that the representation

was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract; and that it was made by the defendant, who procured the plaintiff's signature thereto.

It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels *in pais*. The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim. It has been applied to the precise class of cases of the one before us in numerous well-considered judgments by the courts of this country. *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 392; *Rowley v. Empire Ins. Co.*, 36 Id. 550; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 526; *Combs v. The Hannibal Savings & Ins. Co.*, 43 Missouri, 148. Indeed, the doctrine is so well understood and so often enforced that, if in the transaction we are now considering, Ball, the insurance agent, who made out the application, had been in fact the underwriter of the policy, no one would doubt its applicability to the present case. Yet the proposition admits of as little doubt that if Ball was the agent of the insurance company, and not of the plaintiff, in what he did in filling up the application, the company must be held to stand just as he would if he were the principal.

Although the very well-considered brief of counsel for plaintiff in error takes no issue on this point, it is obvious that the soundness of the court's instructions must be tested mainly by the answer to be given to the question, "Whose agent was Ball in filling up the application?"

This question has been decided differently by courts of the highest respectability in cases precisely analogous to the present. It is not to be denied that the application, logically considered, is the work of the assured, and if left to himself or to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. On the other hand, it is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one State, and having in that State their principal business office, send these

agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy, rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect the insurance as the full and complete representative of the company, in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argument being that, as to all other acts of the agent, he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine, in its full force to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are, *prima facie*, co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. *Beebe v. Hartford Ins. Co.*, 25 Conn. 51; *The Lycoming Ins. Co. v. Schollenberger*, 8 Wright, 259; *Beal v. The Park Ins. Co.*, 16 Wis. 241; *Davenport v. Peoria Ins. Co.*, 17 Iowa, 276. An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal. *Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Horwitz v. Equitable Ins. Co.*, 40 Mo. 557; *Ayres v. Hartford Ins. Co.*, 17 Iowa, 176; *The Howard Ins. Co. v. Bruner*, 11 Harris, 50.

In the fifth edition of American Leading Cases, published A. D.

1872, vol. 2, p. 917, after a full consideration of the authorities, it is said: "By the interested or officious zeal of the agents employed by the insurance companies in the wish to outbid each other and procure customers, they not unfrequently mislead the insured, by a false or erroneous statement, of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers." *Rowley v. Empire Ins. Co.*, 36 N. Y. 550.

The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.

Judgment affirmed.¹

VAN SCHOICK *v.* NIAGARA FIRE INSURANCE CO.

68 N.Y. 434. — 1877.

FOLGER, J. — This was an action upon a policy of fire insurance. It contained this condition: "Any interest in property insured not absolute, or that is less than a perfect title, or if a building is insured that is on leased ground, the same must be specifically represented to the company, and expressed in this policy in writing, otherwise the insurance shall be void." The fact is, that part of the property described in the policy, as subject of the insurance, was a building on leased ground. That fact was not expressed in writing in the policy. The defendant claims that thereby the insurance was void, and puts itself thereon as a defense to the action. It is to be observed of this condition, that it is not one of

¹ See the discussion of this case in *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, reported herein at p. 527; and also the comments upon this case and later decisions of the same court, in *Franklin Fire Ins. Co. v. Martin*, 40 N. J. L. 568, reported herein at p. 435 (439).

those which are subsequent to the formation of the contract, a breach of which may occur after there has been a valid contract made and entered into, and continued in existence for a part of its prescribed term. It is a condition precedent, lying at the threshold of the making of the contract, and which if not then performed, or not then obviated, prevents the formation of an enforceable contract. It is obvious, that this building being upon leased ground, the very moment that the policy passed from the defendant to the plaintiff, the insurance on it was void, if the condition holds. They were concurrent acts, the delivery of the contract, and a breach of this condition; so that at the same instant that the defendant said we insure this building, at the same instant the condition was broken and the insurance was void. So that if nothing is shown to break the rigid effect of this condition, there never was any insurance by this defendant upon that building. We would scarce expect two parties to go through so senseless and trifling an act, if the facts were known to each at the time; but would rather conclude that they had by words or act agreed that the condition should not be considered as binding. "If these defendants were an entity, and could have stood near to that building, when the oral negotiation for insurance was made and completed, and have seen" and known that it was upon leased ground; "could it fairly be contended that they would have offered to the plaintiff, or that he would knowingly have received, as the correctly written evidence of the contract, this policy, with the condition in question, contained in it as an operative and binding clause? We cannot suppose that either plaintiff or defendant would do the utterly absurd thing of making, with deliberation and knowledge, a contract that was void from inception, and was in contradiction of the facts and statements of the negotiation." It is plain that the plaintiff and the agent meant to contract and did contract for the insurance of that building, as a building on leased land. *Cone v. Niagara F. Ins. Co.*, 60 N. Y. 619. Hence we are not surprised that the plaintiff claims that the fact that the building was on leased ground, was made known to the defendant when the policy was applied for; and that the policy was delivered and the premium accepted by them, without insisting upon the fact and the condition. He makes that action of the company, with that knowledge, his reply to their defense based on that condition and its breach. * * *

And so again comes up the oft-recurring and still vexed question, between insurance companies and their policy-holders, whether a fact, thoroughly well known and comprehended by both sides to the contract before it is delivered, may, by force of some condition,

crouched unseen in the jungle of printed matter with which a modern policy is overgrown, make a defense for the company, after the catastrophe and damage has happened against which it professes to guard. It is to be confessed, that the decisions in this State do not, upon a cursory perusal at least, seem strictly in harmony in regard to it. There are cases which hold that where an application is made a part of the policy by the terms of it, and some false assertion has been inserted in the application by the agent, when the truth has been at the same time well known to him, that the insured shall not be prejudiced thereby. *Rowley v. The Empire Ins. Co.*, 3 Keyes, 557; *Plumb v. Catt. Ins. Co.*, 18 N. Y. 392; *Ames v. N. Y. Ins. Co.*, 14 N. Y. 253. There are others, where the fact fell within the condemnation of some condition of the policy; yet as the fact, as it existed, was known to the company, it was held to be estopped from setting up the condition against a recovery. 14 N. Y. *supra*; *Bidwell v. N. W. Ins. Co.*, 24 Id. 302; *Bodine v. Exchange Ins. Co.*, 51 Id. 117. There are others in which there was a suit in equity, seeking a reformation of the contract, and it was held that the facts showed unmistakably, that the parties never meant to enter into a contract with such a condition or description in it as was set up against a recovery; *Cone v. Niagara Ins. Co.*, 60 N. Y. 619; *Mahar v. Hibernia Ins. Co.*, 67 Id. 283. In the latter case, the facts made a clear *estoppel in pais* against the company. It has also been held, that a warranty, part of the printed matter of the policy, has been dispensed with by the oral agreement of the parties made before the delivery of the policy; *McCall v. Sun Mut. Ins. Co.*, 66 N. Y. 505. On the other hand, in an action at law, it has been held, that where the terms of the policy are clear and unambiguous, parol proof is inadmissible to vary them, or to show that either or both parties were not aware that they were exchanging a contract such as was requested, and as agreed with the facts in the situation of the property. *Pindar v. Resolute Ins. Co.*, 47 N. Y. 114. See also *Rohrbach v. Germania Ins. Co.*, 62 Id. 613. And so it has been held that parol proof is not admissible, to show that both parties knew that a statement in an application for a policy was not true. *Ripley v. Etna Ins. Co.*, 30 N. Y. 136. Other cases bearing upon the subject might be cited — *quantum suff.*

There is no doubt but that, ordinarily considered, this condition in a policy was a warranty that the building did not stand upon leased land; and that the truth of that warranty became a condition precedent to any liability on the part of the defendant. Yet, there is no doubt, too, that a condition in a policy may be waived by the insurer, or, as some cases put it, he be estopped from setting it up,

and that such result may be worked by parol, or by act without words. It has been held over and over, that the customary clause in a policy, that it will not be binding upon the insurer until the premium is paid in fact, may be waived by parol, or by act, and the policy may be delivered and become a binding contract upon the insurer, without payment in hand of the premium; *Trustees, etc. v. Br. Ins. Company*, 19 N. Y. 305; *Sheldon v. Atlantic F. Ins. Co.*, 26 Id. 460; *Wood v. Po. Ins. Co.*, 32 Id. 619; *Bochen v. Wms. B. City Ins. Co.*, 35 Id. 131; *Bodine v. Ins. Co.*, 51 Id. 117. As to other waivers, see *Ludwig v. Jersey City Insurance Company*, 48 N. Y. 384, and cases there cited; *Shearman v. Niagara Fire Insurance Company*, 46 Id. 532. Now, in this first class of cases, it has been thought that the fact that the insurer delivered to the insured the written contract, as the consummated agreement between them, and did not then exact present payment of the premium as a necessary precedent to delivery, was too plainly in contradiction with the condition for prepayment, for it to be supposed that it was meant by the insurer or supposed by either party that it was intended to make that condition a potent part of the contract. Such a provision, it is said, could have no effect upon the delivered and perfect contract in which it was contained; 19 N. Y., *supra*. It would be imputing a fraudulent intent to the defendant in this case, to say or to think that they did not mean when they delivered this policy to the plaintiff, to give him a valid and binding contract of insurance, or that they did not mean that he should believe that he had one, or that they did not suppose that he did so believe. And such imputation can be avoided only by supposing that it had overlooked this condition, and so forgotten to express the fact as to the building, in writing, upon the policy; or that it waived the condition, or held itself estopped from setting it up. The condition of prepayment of premium is, like this under consideration, one at the threshold of the making of the contract, and if it is not observed, no valid contract is made unless it is stepped over or thrust aside. It is consistent with fair dealing and a freedom from fraudulent purpose, to hold that one or the other was done; that is, that there was a waiver, or is estoppel.

There are other conditions precedent which may be waived. Thus, in *Myers v. Life Insurance Company*, 27 Penn. St. 268, it is said that the countersigning by the agents is under some circumstances not essential, though required by condition. The ground there stated is, that on an equitable interpretation of the whole contract, it may become the duty of the court to dispense with a portion of the forms of the contract, if it can find any reliable substitute for

them; on the principle that cures defective execution of powers, where the intention to execute is sufficiently plain. The contract was to be complete when delivered by the agents, and countersigning by them was to be the appointed evidence of its proper delivery. There may be other evidence, to be regarded as equivalent. So here, it was not that the defendant would not at all insure a building on leased lands. They did agree to take a risk upon it. But to have it insured by them, the fact of it being on leased land must be expressed to them. This was done. As evidence that it was done, it must, they said in the policy afterwards delivered, appear in writing on the policy. This is, like countersigning by agent, but one of the forms of making the contract. That the policy was delivered, and the premium received, with full purpose of insuring that building, with full purpose of making a valid and obligatory contract, is evidence that through neglect or forgetfulness one of the forms was not observed; or that it was waived by the parties.

This case is to be distinguished from that of *Pindar*, 47 N. Y. 114. There, Pindar asked a policy in a certain form of words. The insurer issued it to him in a different form, and in such form as would not cover certain classes of goods, and as, by the presence of those classes in the store, rendered the whole policy void. It was not proposed to show that the insurer knew that the very class of goods on which insurance was sought was in the store, and that the policy was delivered with the purpose to insure that class, and with the mutual understanding that by the policy it was insured. Hence that case differs from this, and it was properly held that Pindar was bound by his contract. In *Rohrbach's Case*, *supra*, the decision went upon the effect of a peculiar clause in the policy, and in that fact is quite different from this. *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52, is put upon a ground very like that in *Rohrbach's Case*; that it was printed in the application, that the company would not be bound by knowledge of the agent, and that the company could not be held thereby, unless there was fraud, or prevention of the application from making a true statement. *Ripley v. The Etna Insurance Company*, 30 N. Y. 136, is to be distinguished from this in hand. There the representation or warranty was promissory. It was an agreement by the applicant that he would thereafter keep a watchman in his mill of nights. This looked to the future conduct on his part. It was not a part of the form of the contract. And though the agent of the insurer knew the custom of the applicant had not been to keep a watchman in his mill from midnight on the last day of the week till midnight on the first day of the next week, that did not affect his promise thereafter to do differently. It is also

said in that case, that there may be a waiver of conditions, but only on an agreement founded on a valuable consideration, or when the act relied upon as a waiver is such as to estop a party from insisting on the condition. In the case in hand, there is a consideration in the premium paid, which would not have been done with an understanding that the condition should remain and be enforced, thus making the payment futile. In the purview of some of the cases there is also an estoppel.

It is difficult to make all the cases upon this subject harmonize; but by the force of authority, we are constrained to hold that such a condition as this may be waived by the insurer, by express words to that effect, or by acts done under such circumstances as would otherwise impute a fraudulent purpose, and as will estop him from setting up the condition against the insured. * * *

We, therefore, conclude that the judgment appealed from should be affirmed.

CHURCH, Ch. J., ANDREWS and MILLER, JJ., concur; ALLEN, RAPALLO and EARL, JJ., dissent.

Judgment affirmed.

GRAY AND ANOTHER v. GERMANIA FIRE INSURANCE CO.

155 N. Y. 180. — 1893.

MARTIN, J. — The only question we are called upon to determine in this case is whether the knowledge of the defendant's agent that the plaintiffs intended to procure other insurance upon the property covered by the defendant's policy constituted a waiver of the provision therein prohibiting other insurance without the indorsement upon the policy of an agreement to that effect. The courts below have so held. This conclusion was based upon the theory that as the defendant's agent knew that the plaintiffs intended to procure other insurance when the policy in suit was issued, and delivered it with that knowledge, it constituted a waiver of its provision as to other insurance. Manifestly, this theory cannot be sustained. It is well settled in this State that where an insurance company issues a policy, with full knowledge of facts which would render it void in its inception if its provisions were insisted upon, it will be presumed that it by mistake omitted to express the fact in the policy, waived the provision or held itself estopped from setting it up, as a contrary inference would impute to it a fraudulent intent to deliver and receive pay for an invalid instrument. *Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y. 434; *Whited v. Germania F. Ins. Co.*, 76 N. Y.

415; *Richmond v. Niagara F. Ins. Co.*, 79 N. Y. 230; *Woodruff v. Imperial F. Ins. Co.*, 83 N. Y. 133; *Short v. Home Ins. Co.*, 90 N. Y. 16; *Forward v. Continental Ins. Co.*, 142 N. Y. 382; *Wood v. American F. Ins. Co.*, 149 N. Y. 382; *Robbins v. Springfield F. & M. Ins. Co.*, 149 N. Y. 477, 484.

But it is manifest that that principle has no application to the facts in this case. When the defendant's policy was delivered neither of the other policies had been issued, but were subsequently obtained. Consequently, the defendant's policy was valid in its inception. If it became invalid it was by the act of the plaintiffs in subsequently procuring additional insurance, without obtaining an indorsement upon the policy of the defendant's consent. As the defendant issued to the plaintiffs a policy which was valid when delivered, the fact that they informed the defendant's agent of their intention to subsequently procure other insurance was insufficient to justify the courts below in holding that there was a waiver of that condition, or that the defendant was estopped from insisting upon it. *Baumgartel v. Providence-Washington Ins. Co.*, 136 N. Y. 547; *Moore v. H. F. Ins. Co.*, 141 N. Y. 219; *McVierney v. Agricultural Ins. Co.*, 48 Hun, 239.

The distinction between the knowledge of an existing fact which renders a policy void when delivered and the omission of the insured to give notice of and procure the required consent to a subsequent act, which, by its conditions invalidated it, although previously consented to, was clearly pointed out in the authorities cited.

The decisions of the courts below are at variance with the principle that written contracts cannot be controlled or varied by oral evidence, and that a written instrument must be regarded as the receptacle of the entire contract between the parties, and merges all previous oral agreements in it.

Nor do we think the contention of the respondents, that they were entitled to recover upon a parol contract of insurance, made with the agent, can be sustained. There was no proof that the defendant's agent ever agreed to issue a policy different from the one delivered, or that he agreed that other insurance might be procured without the indorsement required. It is manifest that this action was upon the policy issued by the defendant, and was not based upon any other agreement between the plaintiffs and the agent of the defendant.

The judgment of the General Term and of the trial court should be reversed and a new trial granted, with costs to abide the event.

All concur, except GRAY, J., absent

Judgment reversed.

FRANKLIN FIRE INS. CO. *v.* MARTIN.

40 N. J. L. 568. — 1878.

THIS action was brought upon a policy of insurance, under seal, bearing date April 27th, 1870, issued to the plaintiff as owner of the property insured. At the trial before the Circuit a verdict was had by Martin, the plaintiff below, whereupon this writ of error was sued out by the defendant. Errors were assigned upon the record, and upon the proceedings at the trial.

DEPUE, J. — * * * *Fourth.* In the policy the property insured is described as a building occupied "as a dwelling and boarding-house." This description defines the character of the risk assumed, and is a warranty that the property, at the time of the insurance, was used for that purpose. *Dewees v. Manhattan Ins. Co.*, 6 Vroom, 366. In fact, it was at that time occupied as a dwelling and boarding-house, and also as a country tavern, and in a room back of the bar-room there was kept for use a billiard-table. The property continued to be so used until the fire occurred.

In the conditions of insurance it is stipulated that if the assured shall cause the buildings, goods or other property insured to be described in his policy otherwise than as they really are, so that they be charged at a lower premium than is therein proposed, the policy shall be of no force. In the classification of risks, drinking-houses and taverns were classified as extra hazardous, and subject to a higher premium than hazardous risks; and billiard-rooms were named in the specially hazardous class, subject to a still higher premium. Dwelling and boarding-houses were not mentioned in any special classification. The consequence of a misdescription of the use of the premises at the date of the insurance is prescribed by the condition mentioned. It does not avoid the policy simply for a misdescription in that respect. To accomplish that result, the misrepresentation must have been operative to cause the insurance to be effected at a lower premium than it would otherwise be subject to; and that question was properly left to the jury. *Columbian Ins. Co. v. Lawrence*, 2 Peters, 46; 1 Bigelow's Ins. Cas. 264.

Fifth. The insurance was obtained through one Buckley, an agent of the company. The judge received evidence that he inspected the premises at the time of taking the proposals of insurance, and knew the manner in which they were then used, and left the question to the jury whether the parties themselves did not knowingly use the term boarding-house to describe the very thing that was insured; and if they did, in that view the knowledge of the agent was material: That if the agent, acting on his own knowledge, mak-

ing his own survey, undertake to describe the building, it is his description of the risk, and if the company accept it, it agrees that the term used shall describe the risk as it existed.

The evidence in relation to the agent's knowledge of the actual condition of the property was competent on the question whether the assured, by the misdescription, in fact procured the insurance to be made at a lower premium than would otherwise have been demanded. But these instructions were erroneous. They left the jury to find from such knowledge by the agent that the company insured a country tavern under the description of a dwelling and boarding-house—thus making a different contract from that expressed on the face of the policy.

There is a distinction between a representation which is merely collateral to the contract of insurance, and a warranty or condition which is part of the contract itself. A representation collateral to the contract will not avoid the policy though it be untrue, unless it was fraudulently made; but the validity of the entire contract depends upon the truth or fulfilment of the warranties and conditions. *Dewees v. Manhattan Ins. Co.*, 5 Vroom, 247. Where the defense is that a representation collateral to the contract was false, and was fraudulently made, the gist of the defense is the fraud of the plaintiff by which the insurer was misled, and induced to make the contract of insurance. To such a defense proof that the agent of the insurer had knowledge of the true state and condition of the premises is a complete answer; for with such knowledge no deception is practiced. *Marshall v. Columbian Mut. Fire Ins. Co.*, 7 Foster, 157; *Protection Ins. Co. v. Harmer*, 2 Ohio St. R. 452; *Patten v. Insurance Co.*, 40 N. H. 375; *State Mutual Ins. Co. v. Arthur*, 30 Penn. St. 315. A different rule prevails with respect to a warranty contained in the policy; if it is in fact not complied with, the contract falls, without regard to the knowledge of the insurer of the actual condition of the property insured. This distinction between a representation collateral to the contract and a warranty which is part of it is taken in *State Mutual Ins. Co. v. Arthur*, *supra*, and it was there held that knowledge of the insurer or its agent of the exact state and condition of the premises will relieve the insured from the consequences of a false or imperfect representation, but not as against a warranty not complied with.

If the proposal for insurance be prepared by the agent of the company, and he misdescribe the premises, with full knowledge of their actual condition, and there be no fraud or collusion between the agent and the insured, the contract of insurance may be reformed in equity, and made to conform to the condition of the premises as

they were known to the agent. *Collett v. Morrison*, 9 Hare, 162; *In re Universal Non-Tariff Fire Ins. Co.*, L. R. 19 Eq. 385; *Malleable Iron Works v. Phoenix Ins. Co.*, 45 Conn. 465; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Id. 517; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283. But in an action at law upon the policy the rights of the parties must be determined by the contract of insurance, which cannot be altered or modified by extrinsic evidence of a different agreement, to be established from a knowledge of the insurer or its agents of the actual condition of the property insured. *Deweese v. Manhattan Ins. Co.*, 6 Vroom, 366. When the insurer defends on the ground of a breach of warranty, it is no answer that he knew that such warranty was not in fact true. *Columbia Ins. Co. v. Cooper*, 50 Penn. St. 331. Thus, it being stipulated in the conditions of insurance that a false description of the property insured should avoid the policy, it was held that a misdescription defeated the plaintiff's right to recover under it, though the statements were known to be false by the insurer's agent who prepared the description, and informed the plaintiff that in that respect the description was immaterial. *Smith v. Cash Mut. Ins. Co.*, 24 Penn. St. 320. Evidence is not competent in an action on the policy to show that the matter complained of as a breach of warranty was mentioned to the agent at the time of the application, and that he said it was of so little consequence that it need not be mentioned in the policy. *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247. Nor will it be received to show that the insured informed the agent of the exact condition of his title, and that the agent filled out the application in his own language. *Hough v. City Fire Ins. Co.*, 29 Conn. 10. The decided weight of authority is against the admission of such evidence as a clear violation of the salutary rule of law, that all prior statements are merged in the concluded contract, and that a contract put in writing cannot be added to or altered by parol testimony. *Barrett v. Union Mut. Ins. Co.*, 7 Cush. 175; *Lowell v. Middlesex Ins. Co.*, 8 Id. 127; *Jenkins v. Quincy Mut. Ins. Co.*, 7 Gray, 370; *Kibbe v. Hamilton Mut. Ins. Co.*, 11 Id. 163; *Jennings v. Chenango County Ins. Co.*, 2 Denio, 75; *Rohrbach v. Germania Ins. Co.*, 62 N. Y. 47; *Columbia Ins. Co. v. Cooper*, 50 Penn. St. 331; *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn. 235. Many of the cases to the same effect are cited by the chief justice in his opinion in *Deweese v. Manhattan Ins. Co.*, as reported in 6 Vroom, 366, which, in itself, is a weighty authority against the competency of such evidence.

In *Sheldon v. Hartford Fire Ins. Co.*, *supra*, it was held that where the policy and survey constituted a contract between the parties, and there was no imperfection or ambiguity in the contract, evidence

of parol representations made to the agent prior to the issuing of the policy could not be received to explain or qualify the contract. See also *Glendale Mfg. Co. v. Protection Ins. Co.*, 21 Conn. 19-37. In *Peck v. N. L. Mut. Ins. Co.*, 22 Conn. 575, the evidence was received not to vary the terms of the policy, but for the purpose of rebutting the presumption that the policy was a wagering policy. In *Bevin v. Conn. Mut. Ins. Co.*, 23 Conn. 244, it was admitted solely for the purpose of showing knowledge by the company of the insured's intention to travel, in violation of the conditions of the policy, to give effect to a waiver arising from subsequent receipts of premiums. In *Bebec v. Hartford Co. Mut. Ins. Co.*, 25 Conn. 51, proof of communications made by the insured to the agent was received to show that the insured had not fraudulently concealed facts material to the risk. In *Hough v. City Fire Ins. Co.*, 29 Conn. 10, the court had decided that there was no warranty of the condition of the title of the insured, and the evidence was considered legitimate to meet the claim of the company that the insured by a misrepresentation had rendered the insurance void. *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517, was in equity on a bill to reform the policy and enjoin the defense in an action at law upon it. In none of these later cases was *Sheldon v. Hartford Fire Ins. Co.* overruled; nor was parol evidence of prior transactions with the agent of the insurer admitted to vary the terms of the policy, or to make a contract different from that expressed therein.

The leading case in New York is *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio, 75. This case held, in accordance with a series of cases beginning with *Vandevoort v. Columbian Ins. Co.*, 2 Cairnes, 155, that parol evidence that the insured truly informed the agent of the insurer, who prepared the application, as to the situation of the premises, was not competent to vary a warranty on that subject, or save the insured from the consequences of a breach of the contract of insurance. This case was recognized as good law by the courts of that State until the decision of *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 392, where such evidence was held by a divided court to be admissible, not to change the contract, but to produce the same result under the guise of an equitable estoppel. *Plumb v. Cattaraugus Ins. Co.* was followed in *Rowley v. Empire Ins. Co.*, 36 N. Y. 550. It was justly criticised and condemned as founded on erroneous views, by the chief justice in *Deweese v. Manhattan Ins. Co.*, as reported in 6 Vroom, 366; and with *Rowley v. Empire Ins. Co.*, has been greatly shaken by subsequent decisions in the same court, if it was not practically overruled by *Rohrbach v. Germania Ins. Co.*, 62 N. Y. 47-63. In *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283, refor-

mation of the contract of insurance seems to have been regarded as the appropriate method of relief under such circumstances. The condition of the law on this important subject in that State is such that it would not be advisable to adopt it, or prudent to endeavor to follow the decisions of its courts. The discordant and irreconcilable decisions which have grown out of the departure from the law as held in *Jennings v. Chenango County Mut. Ins. Co.*, are cited by Judge Folger in *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 438. Some of the conditions of the policy may be controlled by evidence of the knowledge of the parties at the time the insurance was effected, and others not; but no rule or principle has been promulgated for ascertaining, in advance of the litigation, what stipulations in the contract belong to the one class or the other — a condition of the law sure to result from the effort to deal with contracts of this kind, in disregard of established rules of law, and acknowledged legal principles.

The Supreme Court of the United States has held that the policy of insurance issued by the company, and accepted by the insured, must be taken to be the final agreement of the parties, and that if by inadvertence or mistake, stipulated provisions were omitted, or provisions other than those intended were inserted, the remedy was in equity for the correction of the agreement, and that neither party could resort to the verbal negotiations preliminary to the execution of the policy to contradict or vary its terms, or to ascertain what the contract really was. *Ins. Co. v. Lyman*, 15 Wall. 664; *Ins. Co. v. Mowry*, 96 U. S. 544. But in *Ins. Co. v. Wilkinson*, 13 Wall. 222, the same court, following *Plumb v. Cattaraugus Ins. Co.*, and *Rowley v. Empire Ins. Co.*, held that parol evidence that the application of the insured was prepared by the company's agent, and that he filled up, from inquiries made by himself, the answers to the interrogatories, the falsity of which was the breach of warranty relied on, was competent as a matter of estoppel. The only other cases cited for this decision were *Combs v. Hannibal Ins. Co.*, 43 Mo. 148, which was itself decided on a following of the two New York cases above cited, and *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 526, which was a bill in equity for the reformation of the policy.

It is manifest that the theory that such parol evidence, though it may not be competent to change the written contract, may be received for the purpose of raising an estoppel *in pais*, is a mere evasion of the rule excluding parol testimony when offered to alter a written contract. A party suing on a contract in an action at law must be conclusively presumed to be aware of what the contract

contains, and the legal effect of his agreement is that its terms shall be complied with. Extrinsic evidence of the kind under consideration must entirely fail in its object unless its purpose be to show that the contract expressed in the written policy was not in reality the contract as made. A defendant cannot be estopped from making the defense that the contract sued on is not his contract, or that his adversary has himself violated it in those particulars which are made conditions to his rights under it, on the ground of negotiations and transactions occurring at the time the contract was entered into, unless the plaintiff is permitted to show, from such sources, that the contract, as put in writing, does not truly express the intention of the parties. The difficulty lies at the very threshold. An estoppel cannot arise except upon proof of a contract different from that contained in the written policy, and an inflexible rule of evidence forbids the introduction of such proof by parol testimony when offered to vary or affect the terms of the written instrument. The subject has been so fully and forcibly discussed by Chief Justice Beasley in *Dewees v. Manhattan Ins. Co.* that it is unnecessary to pursue it further.

Nor is the reasoning of the learned justice who delivered the opinion in *Insurance Co. v. Wilkinson*, that the admission of such testimony is rendered necessary by the manner in which agents are sent over the country by insurance companies and stimulated by them to exertions in effecting insurance — which often leads to a disregard of the true principles of insurance as well as fair dealing — any more satisfactory. It introduces into the administration of the law the novel doctrine that the rules which regulate the admission of evidence fluctuate with the character of the agencies parties employ in transacting business, and upon that foundation establishes an exceptional rule of evidence to be applied to an entire class of contracts whether agents, ignorant, incompetent or unscrupulous, were employed or not. It leaves the whole subject of contracts of insurance at the mercy of a kind of evidence which is regarded as too untrustworthy and unreliable ever to control contracts in writing.

The cases usually cited for the proposition that a contract of insurance is excepted out of the class of written contracts with respect to the admissibility of parol evidence to vary or control the written contract will be found, on examination, to be, to a large extent, those in which the proof has been received with a view to the reformation of the policy in equity or to meet the defense that the contract was induced by false and fraudulent representations not embodied in the contract, or are the decisions of courts in which the legal and equitable jurisdictions are so blended that the func-

tions of a court of equity have been transferred to the jury box. A distinction is sometimes made between policies issued by a stock company and those issued by a mutual company. This distinction is without any substance. In a mutual company the insured, by taking out policies, become members of the company. But, nevertheless, a member of a corporation, and even a director, in dealing with the corporation, stand, with respect to their contracts, just the same as a stranger (*Stratton v. Allen*, 1 C. E. Green, 229), and the powers of agents of every kind of principals to act for and bind their principals are determined by the unvarying rule of ascertaining what authority is delegated to them. How the contract was effected, whether directly with the insurer or by the intervention of agents, is of no consequence. The question of the admissibility of the testimony does not relate to the method by which the contract was made. It concerns the rule of evidence by which the contract, however made, shall be interpreted.

Upon principle, it is impossible to perceive on what ground such testimony should be received. A policy of insurance is a contract in writing, of such a nature as to be within the general rule of law that a contract in writing cannot be varied or altered by parol testimony. If it be ambiguous in its terms, parol evidence such as would be competent to remove an ambiguity in other written contracts may be resorted to for the purpose of explaining its meaning. If it incorrectly or imperfectly expresses the actual agreement of the parties, it may be reformed in equity. If strict compliance with the conditions of insurance, with respect to matters to be done by the insured after the contract has been concluded, has been waived, such waiver may, in general, be shown, by extrinsic evidence, by parol. Further than this it is not safe for a court of law to go. To except policies of insurance out of the class of contracts to which they belong, and deny them the protection of the rule of law that a contract which is put in writing shall not be altered or varied by parol evidence of the contract the parties intended to make, as distinguished from what appears, by the written contract, to be that which they have in fact made, is a violation of principle that will open the door to the grossest frauds. If, as was said by Judge Folger, in *Van Schoick v. Niagara Fire Ins. Co.*, "a fact thoroughly well known and comprehended by both sides to the contract before it is delivered may, by force of some condition crouched unseen in the jungle of printed matter with which a modern policy is overgrown, make a defense for the company, after the catastrophe and damage have happened, against which it professes to guard," the remedy is with the Legislature to prescribe what conditions only

shall be valid, and to compel the printing of them in the policy, in such a manner as to be capable of being read and understood. A court of law can do nothing but enforce the contract as the parties have made it. The legal rule that in courts of law the written contract shall be regarded as the sole repository of the intentions of the parties, and that its terms cannot be changed by parol testimony, is of the utmost importance in the trial of jury cases and can never be departed from without the risk of disastrous consequences to the rights of parties.

In the present case the property insured was described in the policy as a dwelling and boarding-house. There was no ambiguity in the terms used that justified resort to extrinsic evidence to explain the meaning of the contract. The effect given to the testimony on this subject, by the charge of the court, was to change the terms of the contract and reform it, and make another and a different contract. In this there was error, for which the judgment should be reversed.¹

For affirmance — DIXON, CLEMENT, LILLY — 3.

For reversal — The CHANCELLOR, CHIEF JUSTICE, DEPUE, REED, SCUDDER, VAN SYCKEL, WOODHULL, DODD, GREEN — 9.

¹ "There was a condition which declared that 'if the premises hereby insured shall become vacated by the removal of the owner or occupant, and so remain for a period of more than fifteen days, without notice to the company and consent indorsed hereon,' it should become void. The premises were burned during such a vacancy, but evidence was received and acted on that before the issuing of the policy the insured had stated to the agent that he expected during the currency of the policy to leave his house vacant during a year or more, and was informed it would make no difference. * * * The vacancy concerning which the parties conversed, if there was any such conversation was one contemplated in the future, and the stipulation or understanding, if it amounted to anything was an executory contract, intended to form a part of the contract of insurance. This being so, the doctrine cannot be admitted that any part of the completed contract can rest in parol. The policy was the conclusion of the bargain, and its acceptance would exclude any parol promises inconsistent with it. There is no resemblance between a parol variance of a written contract, and a waiver of a condition after it has become binding on the parties." — *Hartford Ins. Co. v. Davenport*, 37 Mich. 608, 611-12. See also *Promissory Representations*, ante, p. 118.

3. AFTER THE POLICY IS ISSUED, BUT BEFORE A FORFEITURE.

TAYLOR, J., IN *ALEXANDER v. CONTINENTAL INSURANCE CO.*

67 WIS. 422, 427. — 1886.

THE insured had taken a policy in which there is a condition that the policy shall terminate if any instalment on the premium note is not paid promptly on or before the day it becomes due. The company has no place in the vicinity of the insured where the money can be paid. The agent says to the insured: "True, the policy says the liability of the company shall cease immediately if the money be not paid on the day, but I say to you, as agent of the company, that I will give you notice when payment is required." The insured, relying upon this promise of the agent, does not pay on the day. Two months or more after the day the agent appears and demands payment, and payment is made. No claim is made that there has been a forfeiture of the policy, or that it is necessary to have the policy renewed by procuring the written consent of the company in the manner prescribed in the contract, and the agent renews his promise to give notice when the next and subsequent instalments should become due, and says he will call upon her personally for payment. No notice is afterwards given, and no one calls for the money. The note is retained by the company, and not presented for payment, nor payment thereof demanded in any way, and in the meantime a loss occurs.

The condition or forfeiture in the policy having been once waived, and the insured having been led to believe that it would not be thereafter enforced, the company cannot enforce it except by an actual demand of payment of the money due on the note and a neglect or refusal to pay the same, or by a return of the note to the insured with notice that the company insists upon the condition in the policy. See *Marcus v. St. L. Mut. L. Ins. Co.*, 68 N. Y. 625; *Dilleber v. K. L. Ins. Co.*, 76 N. Y. 567; *Sheldon v. A. F. & M. Ins. Co.*, 26 N. Y. 460, 465; *Goit v. National P. Ins. Co.*, 25 Barb. 189; *Devine v. Home Ins. Co.*, 32 Wis. 471, 477; *Howell v. K. L. Ins. Co.*, 44 N. Y. 276, 283. See also many of the cases in this court cited above. The case of *Dilleber v. K. L. Ins. Co.*, *supra*, was a case of a life policy, where prompt payment had been waived by the company; and afterwards, when the insured offered to pay some days after the payment became due by the terms of the policy, the company refused to receive payment, and the insured shortly afterwards died. It held there was no forfeiture. The court say: "It may be inferred that the company had waived a strict compliance

in their written condition, and they also aid in the proper construction of the agreement of the parties made in April, 1860. Indeed, the conduct of both parties from the time of that transaction seems to indicate that they regarded it as a part of the arrangement of insurance, and the insured was not in fault in trusting to its continuance. The company was bound by it, and could not in good faith insist upon a strict compliance with the condition of payment until, before a premium became due, they gave the insured notice that they should exact it. They cannot, when their own interest seems to demand it, waive a condition, and, after reliance upon it by the insured, withdraw the waiver without notice." The above argument is strictly applicable to the case at bar, upon the allegations made in the complaint, which, for the purposes of this case, are admitted to be true.

4. AFTER FORFEITURE.

OAKES v. MANUFACTURERS' FIRE AND MARINE INS. CO.

135 Mass. 248. — 1883.

HOLMES, J. — This is an action upon a policy of insurance conditioned to be void if the property should be "sold or conveyed in whole or in part." The plaintiff subsequently conveyed through a third person to his wife, and the answer sets up the conveyance as a breach of condition. It has already been decided that the condition was broken by the conveyance. *Oakes v. Manufacturers' Ins. Co.*, 131 Mass. 164. But at a second trial the plaintiff offered to prove that he went to the office of the defendant company, and orally notified it of the conveyance and of a mortgage, which was made before the policy and was still outstanding, and requested the defendant to cure the defect in the policy caused by the conveyance, and handed the policy to the defendant for that purpose; and that, at that time, and upon said request, the defendant made the following indorsement on the policy: "Boston, Aug. 29, 1877. Pay the within insurance of Sixteen Hundred Dollars on House in case of loss to the Andover Savings Bank. Chas. T. Oakes. Assented to Aug. 30, 1877. Jas. J. Goodrich, *Secretary*." That said policy was then redelivered by the defendant to the plaintiff, and no return of premium, or any portion thereof, was made. The court excluded the evidence, and directed a verdict for the defendant.

The plaintiff's insurable interest is admitted, and the defendant supports this ruling and direction on the single ground that the plaintiff's offer was an attempt to modify and enlarge the effect of the written indorsement by evidence of contemporaneous oral dealings, and to import into it, or establish alongside of it, a larger scope or transaction than can be gathered from its words. No other question is raised.

In the opinion of the court, the evidence was admissible. To begin at a little distance from the ground of the chief contention, the highest authorities have declared that the condition against alienation does not take away the defendant's power to waive a breach and to continue the insurance in force, and that a new consideration is not necessary for this purpose. *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, 419.¹ *Wheeler v. Watertown Ins. Co.*, 131 Mass. 1, 8; *Insurance Co. v. Norton*, 96 U. S. 234. A condition subsequent can rarely be meant to deprive the party for whose benefit it is inserted of his choice in this respect. Hence a contract which is subject to such a condition is usually construed to provide by its own terms that it shall remain in force after a breach, unless by some overt act the contractor shall manifest his election to avoid it or if by some overt act he shall manifest his election to affirm it, as the case may be. It follows that, if he elects to remain bound, he remains so by force of the original contract, and on the original consideration.

It might be said that this reasoning applies to a condition subsequent, strictly so called, which goes to the whole contract, and which, if insisted on, avoids it *ab initio*, but that the proviso in this case only limits the scope of the promise and the extent of the risk assumed. And then it might be argued further, that the scope of a promise cannot be enlarged without a new consideration. The answer is, that, even taking it that way, by the same settled construction that reads "void" as "voidable," the limitation of the

¹ "But it may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is as matter of law waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel. *Allen et al. v. Vermont Mut. Fire Ins. Co.*, 12 Vt. 366; *Webster v. Phoenix Ins. Co.*, 36 Wis. 67; *Gans v. St. Paul Ins. Co.*, 43 Id. 109; *Insurance Co. v. Norton*, 96 U. S. Sup. Ct. 234; *Goodwin v. Mass. Mut. Life Ins. Co.*, 73 N. Y. 480, 493; *Prentice v. Knickerbocker Life Ins. Co.*, 77 Id. 483; *Brink v. Hanover Fire Ins. Co.*, 80 Id. 108." — *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, 419.

promise is itself conditional, and that the original promise is to insure throughout the term, in spite of an alienation, in case the insurer manifests an election to keep the insurance on foot.

Whether it be said that the contract remains subject to affirmance after an alienation, or that the promise is alternative to insure up to or beyond that event, at the election of the promisor, all that is necessary to impose the greater burden on the insurer is an overt act directed toward the insured and manifesting an election to assume that burden. And it is enough that the act implies that the insurance is to continue, although its immediate purpose is some further result.

Thus, where, as here, the thing set up as manifesting the election is a writing, the election need not be expressed in the words used. The writing may contain no reference to the breach of condition, yet if the undertaking which it does set forth carries with it, as the necessary premise, that the insurer was content to remain bound, he will remain bound as certainly as if he had written out that such was his intention.

Of course, however, if the act thus relied on as an indirect election be shown to have been done in ignorance of the breach of condition, it will not continue the insurance unless in the exceptional case where the insurer has acted with indifference to what the facts might be, and has assumed to act with equal effect however they might turn out. Parol evidence is therefore admissible to show that the insurer knew of the breach at the time of the act relied on.

The application of the foregoing principles to this case is obvious. The defendant had the power to continue the insurance if it chose. When, at the request of the plaintiff, it indorsed upon the policy its consent to pay the insurance, in case of loss, to the mortgagee, it did an act which necessarily assumed that the contract remained in force; for by such an indorsement it necessarily admitted and affirmed that, in case of loss, money would be due and payable to some one under the contract. Such an affirmation was an overt act of election to continue the insurance, provided the act was done with knowledge that the condition had been broken. But this indirect effect of the indorsement as an act of election depended upon the defendant's having such knowledge. Hence, evidence that the conveyance had been communicated to the company was most material, not as tending to enlarge the writing or add a further agreement, but as showing that the condition attached by the law to the operation of the indorsement as an act of election had been satisfied.

Barrett v. Union Ins. Co., 7 Cush. 175, was cited on behalf of the

defendant. In that case, a policy was issued by a mutual company, subject to a by-law, which formed part of the contract, to the effect that all policies upon property previously insured should be void, unless such previous insurance was mentioned in the policy at the time it was issued. There was previous insurance not mentioned in the policy; and it was rightly held that, in an action on the policy, parol evidence was inadmissible to show that this had been made known to the company and assented to by it. The evidence would have directly contradicted the written instrument declared on. The policy in effect stipulated that its delivery should not make a contract if there was previous insurance not mentioned. The evidence went to show that delivering the policy made a contract, notwithstanding such insurance; or, in other words, that the condition precedent was not insisted on at the very moment when, by the words of the policy, it was insisted on. The other cases cited do not require special notice.

To avoid misapprehension, it may be well to add that this case is not affected by the clause providing that the policy may continue for the benefit of the purchaser, if the company consents, etc. The plaintiff claims in his own name, under the contract made with him, which he made voidable by his act, but which he says he can prove the company elected to affirm. The power of the company to elect in favor of the contract is not dependent upon any printed clause, but is given to it as legally incident to a condition subsequent.

Exceptions sustained.

LANTZ *v.* VERMONT LIFE INS. CO.

139 PA. 546. — 1891.

PAXSON, C. J. — This was an action on a policy issued by the defendant company, insuring the life of Simeon B. Lantz, for the benefit of his wife, Evalina E. Lantz, the plaintiff below. The policy stipulated that the premiums should be paid quarterly, on the 19th days of February, May, August, and November in each year; that if the said premiums should not be paid on the days named, and in the life-time of the assured, the policy should cease and determine; that the acceptance of a premium after maturity should not be deemed or construed as a waiver, or as any evidence of an agreement to waive the payment of any future premiums at the time the same shall, by the terms of the policy, become payable, and that no person except the president and secretary, acting together, are authorized to make, alter, or discharge contracts or waive forfeitures.

Upon the trial below it was among the admitted facts of the case that the premiums falling due in May, August, and November, 1887, were not paid at maturity, but were paid after maturity, and accepted by the company; that the premium due on February 19, 1888, was not paid at maturity; that on March 2, 1888, a brother of the insured, who was also a policy-holder, called on the general agent of the company in Philadelphia, and informed the latter that Simeon B. Lantz would be down on March 6th to pay his premium, and was told that he, the agent, did not make out his monthly report until the 10th of the month, and that if the premium was paid by the 9th it would be all right. So far there is no dispute. But Mr. Lantz, the witness, testified that there was no condition annexed to the promise to receive the money, while Mr. Ryer, the agent, testified that he said he would receive the money, provided the insured was in his usual health at the time; that he would have to be satisfied upon this point either by a health certificate, or by seeing the insured personally, and that in the meantime the latter was carrying the risk himself. This question of fact was submitted to the jury, and they have found there was no condition annexed to the promise. We must, therefore, treat the case upon this basis.

It may simplify the discussion somewhat to note the following admission of the learned counsel for the company, to be found on page 12, of his paper-book: "It was admitted on the trial that the insured had paid three prior premiums after maturity, which had been received by the defendant; and also that the manager was in the habit of, and practically had authority to, receive premiums and deliver renewal receipts after maturity, provided that the insured was at the time of the payment in good health. This was as far as the testimony went. There was no evidence which, even the plaintiff pretends, goes to show that the agent had authority, or has ever acted beyond this, or that the company had ever known of or ratified such agreement; and it was further admitted that, if Simeon B. Lantz, the insured in this case, had on March 9th been alive and in good health, and had tendered payment of the premium, it would have been received." Simeon B. Lantz, the insured, was in good health on March 2d, but was taken ill on the next day, and died on March 6th. The above admission disposes of any question as to the authority of the general agent to receive overdue premiums.

But we must stop where the admission ends, unless a further or greater authority is to be found in the evidence. In order to establish an authority to receive an overdue premium after the death of the insured, one of two things must be shown, viz.: (a) An express authority to do so, conferred upon him by the company; or (b) such

a course of dealing on the part of the company, by ratifying or recognizing such acts of the agent, as would justify persons dealing with said company in assuming that he possessed such authority. There is not a word in the testimony to sustain either of these propositions. All that it shows was the receipt of overdue premiums on three occasions. But the insured was in full life and health at the time. The case of the plaintiff, if sustained at all, must rest upon the promise of the agent to receive the premium up to the 9th day of March. This promise, as before observed, the jury have found to be an unconditional one. This I understand to mean that the money would be received as late as the 9th of March, without regard to the health of the insured, or even his death prior to that time. It remains to consider the legal effect of such promise.

The first question which logically suggests itself is, what was the legal effect upon the *status* of the policy by the default or failure to pay the premium due on the 19th of February? Did it continue to bind the company and protect the insured thereafter? And, if so, how long did it remain in force? Was it for a week, a month, or a year? I know of no instance in which a policy was held to be in force after such a default, unless in pursuance of a contract made between the company and the insured contemporaneous with the insurance, or during the life of the policy. In *Helme v. Insurance Co.*, 61 Pa. St. 107, the plaintiff offered to prove "that it is the custom among insurance companies to receive premiums if tendered at any time within thirty days of the time they fall due, provided the insured is in usual health, and that this is the custom among companies issuing policies stipulating that non-payments of premiums at the day shall be a forfeiture." This offer was rejected by the court below, and the rejection was held to be error, Chief Justice Thompson saying: "It might have been a difficult thing to prove such a custom, but that was not a good ground on which to refuse the offer." The grounds of this decision are obvious. While a custom which has grown into a law may not be heard, as a general rule, to affect the terms of a statute nor a contract to the extent of enlarging or abridging the force of it, yet it may interpret either. *Rapp v. Palmer*, 3 Watts, 178. The chief justice gives a number of examples of the application of this principle; among others, the familiar instance of the days of grace on commercial paper. By the custom of merchants, so universal as to have grown into law, such paper is not due until three days after it purports to be due; or, rather, the remedy is suspended during that period.

It was not alleged that any such custom existed in this case. There was not even an offer to show it, much less proof to support

it. Did the fact that the company upon three prior occasions accepted the premium from the insured after maturity, the insured being in good health at the time, continue the policy in force after the default on the 19th of February? I know of no authority for such a proposition, and none has been called to our attention. It was at most a mere personal indulgence, a matter of grace on the part of the company, and all that can be claimed for it is that it may have led the insured to believe that, if he again neglected to pay on the day, the money would be accepted if paid shortly thereafter, provided no change had occurred in his condition of health. The law upon this subject is so clearly stated by Mr. Justice Bradley in *Thompson v. Insurance Co.*, 104 U. S. 252, that I need make no apology for quoting it at length: "The last replication sets up and declares that it was the usage and custom of the defendants, practiced by them before and after the making of said note, not to demand punctual payment thereof at the day, but to give days of grace, to wit, for thirty days thereafter; and they had repeatedly so done with Thompson and others, which led Thompson to rely on such leniency in this case. This was a mere matter of voluntary indulgence on the part of the company, or, as the plaintiff himself calls it, an act of leniency. It cannot be justly construed as a permanent waiver of the clause of forfeiture, or as implying any agreement to waive it, or to continue the same indulgence for the time to come. As long as the assured continued in good health, it is not surprising, and should not be drawn to the company's prejudice, that they were willing to accept the premium after maturity, and waive the forfeiture which they might have insisted upon. This was for the mutual benefit of themselves and the assured, at the time; and in each instance in which it happened it had respect only to that particular instance, without involving any waiver of the terms of the contract in reference to their future conduct. The assured had no right, without some agreement to that effect, to rest on such voluntary indulgence shown on one occasion, or on a number of occasions, as a ground for claiming it on all occasions. If it were otherwise an insurance company could never waive a forfeiture on an occasion of a particular lapse without endangering its right to enforce it on occasion of a subsequent lapse." Such a consequence would be injurious to them and to the public."

The consequence of a default in the payment of the premium is defined in the policy itself. It declares that, if not paid on the days named, and in the lifetime of the insured, the policy should "cease and determine." By this I understand that it is suspended, it ceases to bind the company and to protect the assured, and this

without any act or declaration on the part of the former. It does not require a formal forfeiture. This term is often used, and, I think, inaccurately, in such cases. Nor is the policy void in the general sense of that term. It is voidable at the election of the company, and that election can be exercised without notice to the assured, for the reason that the policy itself is notice that his rights cease with the non-payment of the premium. As to him it is a dead policy. It is true it may be restored to life by the subsequent payment of the premium, and its acceptance by the company. This, however, is a new contract by which the company agrees in consideration of the premium to continue in force a policy which had previously expired; in other words, it is a new assurance, though under the former policy. *Want v. Blunt*, 12 East, 183. I do not understand it to be contended that, had the assured died between the 19th of February and the 2d of March, there could have been a recovery on this policy. It seems almost a work of supererogation to cite authorities for so plain a proposition, and I will refer to but few, out of an abundance. In *Insurance Co. v. Rosenberger*, 84 Pa. St. 373, which was a case of fire insurance, our Brother Sterrett, after saying that the default suspended the protection of the policy, continued: "Upon the payment of the assessment the policy would have been revived in its full vigor; but it was never paid, or even tendered, until after the fire, and as delinquent policy-holders they had no right to maintain the action without showing that the default was either waived or excused by the company. There is no evidence of waiver, nor do we think there is any evidence to excuse the default. There was considerable testimony showing that great indulgence was extended to delinquent members, and that the company was accustomed to receive assessments long after they were due; but this is entirely consistent with the fact that, while the default continued, the protection of the policy was suspended." In *Insurance Co. v. Rought*, 97 Pa. St. 415, it was said by Mr. Justice Mercur: "It is well settled, if a member of a mutual insurance company is in default in the payment of an assessment upon his policy, after due notice according to the by-laws and rules of the company, the protecting power of the policy is suspended until the assessment is paid. No recovery can be had for a loss sustained during the continuance of such default." Citing *Hummel's Appeal*, 78 Pa. St. 320; *Insurance Co. v. Buckley*, 83 Pa. St. 293; *Insurance Co. v. Rosenberger*, 84 Pa. St. 373; *Insurance Co. v. Cochran*, 88 Pa. St. 230. It is true these were cases of fire insurance companies, but the principle is equally applicable to a case of life insurance.

This we think sufficient to show that no recovery could have been

had upon this policy had the assured died between the date of the maturity of the premium and the promise of the agent to accept the premium on the 9th of March. Regarding that as a promise to accept the premium even in the case of the previous death of the assured, we are led to inquire, in the first place, what authority had the agent to make such a promise? The condition of the policy is explicit that the premium must be paid "in the life-time of the insured." Had the agent the authority to waive this condition? The policy not only declared that no person except the president and secretary, acting together, are authorized to make, alter, or discharge contracts, or waive forfeitures, but a notice to the same effect was printed on the back of each renewal receipt given to Mr. Lantz. It was not alleged that the president and secretary, acting together or singly, had ever waived this condition in the policy, or that they, or either of them, had given authority to the agent to waive it in this or any other instance. No course of dealing was shown on the part of the company by which the grant of such authority to the agent could be implied. There was not even an attempt to prove that the company or its agent had ever received an overdue premium after the death of the assured. There is nothing within the four corners of this record to show that the agent had authority, express or implied, to waive this condition. What right had the assured to suppose, with this condition in the very front of his policy, that the agent would receive his overdue premium after his death?

We are not without authority upon this point. The leading case is *Want v. Blunt*, 12 East, 183. The following statement of the facts is condensed from the opinion of Lord Ellenborough. The policy provided for the payment of quarterly premiums on March 25th, June 24th, September 29th, and 20th of December during the life of the said W. W. Want, or within such time after those days, respectively, as is or shall be allowed for that purpose by the rules of the said society. It was provided by the rules of the society that if any member neglected to pay the quarterly premiums for fifteen days after the same become due, the policy will be void. This provision was attached to the policy. The quarterly payments were all paid at maturity until the one that came due on December 20th, which was not paid, and Want died on December 25th; and on December 27th, two days after his death, but within the fifteen days, his executors tendered the payment of the premium, which was refused. The court sustained the refusal, Lord Ellenborough saying, *inter alia*: "This is a contract of assurance, and must be construed according to the meaning of the parties as expressed in

the deed or policy. * * * The risk insured against is his death, and the premium is a quarterly payment, to be made by him to the society during his life. The duration of the insurance is so long as he shall continue to make those quarterly payments; but the insurance is not to be void if he pay the quarterly premium within such time after the quarter day as is allowed by the rules of the society. * * * The covenant on the defendant to pay the wife's annuity after Want's death is: 'If Want shall pay, or cause to be paid, the quarterly premium on every quarter day during the life of Want, or within such time after as shall be allowed by the rules of the society for that purpose;' in construing which sentence, the expression, 'during the life of Want,' must be understood as applying to and carried on to the latter part of the sentence, and is the same as if the words 'during the life' had been repeated after the words 'within such time after,' *i. e.*, or 'within such time after, during the life.' * * * For these reasons we are of opinion that the death of W. W. Want, which happened on the 25th of December, was during a period of time not covered by the policy, and that on the true construction of the policy and rules of the society, the insurance could not be continued beyond the expiration of the quarter, which ended on the 20th of December, by a tender of the premium by his executors after his death, though within fifteen days after the quarter day, so as to include within the policy the period of his death." In *Simpson v. Insurance Co.*, 2 C. B. (N. S.) 257, the words of the policy were: "Provided he, the said insured, on or before * * * pay or cause to be paid to the defendant the annual premium;" and on this point the court said: "The policy was to continue, provided he, the insured, paid the premium within the twenty-one days; and this, we think, did not give the executors the right to pay it after his death." To the same point is *Pritchard v. Society*, 3 C. B. (N. S.) 622; *Insurance Co. v. Ruse*, 8 Ga. 534. The rule laid down in *Want v. Blunt*, *supra*, appears to have been followed in all subsequent cases where the same point arose. If there has been any departure it has not been called to our attention.

If, however, we are wrong in this, if we regard the condition in the policy that the premium must be paid in the life-time of the insured, as of no effect, or, if effective, that it has been waived, there is another reason why the company was not bound to receive the premium after the death of the assured. I have endeavored to show that by the failure to pay the premium, the policy lapsed, or was suspended, on the 19th of February. With the policy in this condition, the plaintiff proved, as already stated, an unconditional promise on the part of the agent of the company to accept the pre-

mium up to the 9th of March. In the ordinary case of the payment of an overdue premium, as all the authorities show, the policy does not bind between the default and the payment. The plaintiff claims that this case does not come within the rule; that the promise enlarged the time of payment, precisely as if March 9th had been the period stipulated in the policy; and that from the time the promise was made until the time it was to be fulfilled the policy was in full force. But if, as I have at least endeavored to show, the policy did not bind between the default and the promise, what occurred on the 2d day of March to change the situation of the parties and restore this dead policy to life? Was it the payment of the premium? The premium was not paid. Was it a promise to pay it? There was no such promise. There was nothing but the bare promise of the agent to accept the premium if paid by the 9th of March. Had it been paid by the assured prior to that date, and accepted by the company, the policy undoubtedly would have been restored to life. This would result, not by virtue of the promise of the agent, but from the acceptance of the premium as a consideration for the renewal. It would have been a new assurance under the old policy. The mere promise of the agent, made after the default had occurred, to receive the premium up to March 9th, was a *nudum pactum*. It was not a contract, because there were no contracting parties. The assured gave nothing; promised nothing. A lapsed policy can only be restored to life, so far as the assured is concerned, by the actual payment and acceptance of the premium, or a contract based upon a sufficient consideration. What consideration did the company receive for carrying this risk from the 19th of February until the 9th of March? Had the insured lived until the latter date, and then refused or neglected to pay his premium, he would have had the benefit of an insurance on his life during said period without paying a dollar of consideration. For, as before stated, he did not give anything, nor did he promise anything. It was optional with him to pay. The company could not have enforced it against him had he declined. There is no provision in the policy which covers such a case. If the insured does not pay, the policy drops, and the contract relation ceases.

Marvin v. Insurance Co., 85 N. Y. 282, is so exactly like the case in hand upon the facts that a reference to it will not be out of place. In that case one Milton B. Marvin had a policy of \$3,000 on his life, payable to his wife in case of his death. The premium due on the 13th of April was unpaid. On the 27th of April, Hinkle, the agent of the company, told the assured that if he paid the premium the next morning, the 28th, he, the agent, would receive the same.

Hinkle went to the house of the assured the next day, and there found him lying sick upon his bed, and, on being offered the overdue premium by the assured, declined to receive it at that time, because the assured was then sick, but told him to keep the money, and when he got well, he, Hinkle, would receive it, and keep the policy alive. The assured never did recover from his sickness, the premium was not paid, and the company notified the assured that it would hold itself absolved from the contract by reason thereof. The assured died in the following September. Under this state of facts it was held there could be no recovery upon the policy, the court below saying: "We think the plaintiff was properly nonsuited. As we understand the law as laid down by the court of last resort in such cases, in order to a valid extension of the time for the payment of a premium upon a life-policy after the time of payment has gone by, there must be some valid consideration for the extension or waiver of the condition of payment, or there must be something said by or on behalf of the insurance company, while the party bound to make the payment has still time and opportunity for so doing, by which the insured is induced to believe the condition is waived, or that strict compliance will not be insisted on. This introduces an element of estoppel in the case. In such a case it would be unjust to allow the insurance company to repudiate the agreement, and to insist that, because of the non-payment of the premium punctually, which omission had been induced or countenanced by its own act, it should be absolved from the performance of its part of the contract." This case was affirmed in the Court of Errors and Appeals in an opinion by Finch, J., principally upon the ground that, even if Hinkle was the general agent of the company, he had no authority to waive the condition as to payment, the clause in the policy containing a condition similar in this respect to that in the policy in this case. For this reason the court did not deem it necessary to express an opinion upon the ground upon which the court below rested the case, viz., the want of consideration for the promise, but said expressly: "It must not be inferred that we deem the ground of the decision below incorrect." This case is valuable for the further reason that it shows very clearly the ground of the distinction between a promise to extend the time of payment made before the time of such payment and one made after the default. In the former instance the assured may have relied upon the promise, and allowed the time to slip by, whereas, without such promise, he might have procured the money and paid the premium.

Hence the cases hold that the company, having misled the assured to his harm, are estopped from alleging a default because of non-

payment on the day. But where a promise is made after the default the assured has not been misled or injured in any manner. He has allowed his policy to lapse by his own neglect. It can only be restored by the consent of the company, and he has no reason to suppose that if he dies before the matter is perfected by the payment and acceptance of the premium the company will pay as in the case of a live policy.

In nearly every case cited to show the authority of an agent to bind the company, by a promise made after a default to pay the premium, the decision of the court was rested upon the ground of estoppel, a principle which I do not think has any application to the case in hand. In *Dean v. Insurance Co.*, 62 N. Y. 642, the agreement to extend the time was not only made before the premium became due, but the company had actually received the notes of the assured for the payment of three-fourths of the premium. This not only introduced the element of estoppel, but the notes received constituted a valid consideration for the waiver of punctual payment. In *Homer v. Insurance Co.*, 67 N. Y. 478, the agreement extending the time of payment was also made before the premium fell due, and thus the policy-holder was prevented from paying the premium on the day it became due by the terms of the policy. In *Tennant v. Insurance Co.*, 31 Fed. Rep. 322, the credit was extended while the policy was in full force. In *Church v. Insurance Co.*, 66 N. Y. 222, the dealings were between the assured and the home office, and no question was involved as to the authority of the agent. The court held there was evidence to go to the jury that a credit was intended, inasmuch as it showed a prior dealing with the assured for many years, and that he was in the habit of getting policies without paying for them at the time. In *Insurance Co. v. Norton*, 96 U. S. 234, there is an expression by Mr. Justice Bradley which indicates that he did not see any difference between a promise to extend the time of the payment of the premium, made before the default, and a promise made after such default. In this case, however, there was not only a promise made to pay, but this was followed up by an actual tender of the premium, and a refusal by the company of such tender. This presents an entirely different state of facts from the case I am discussing, and Mr. Justice Bradley's remarks must be taken in connection with the particular facts to which he was referring. In *Insurance Co. v. Eggleston*, 96 U. S. 572, the question was whether the assured was excused for not paying his premium at maturity. This clearly appears from the concluding portion of the opinion of Mr. Justice Bradley. It is as follows: "The insured, residing in the State of Mississippi, had always dealt with agents of

the company, located either in his own State, or within some accessible distance. He had originally taken his policy from, and had paid his first premium to, such agent, and the company had always, until the last premium became due, given him notice what agent to pay to. This was necessary, because there was no permanent agent in his vicinity. The judge rightly held that, under these circumstances, he had reasonable cause to rely on having such notice. The company itself did not expect him to pay at the home office. It had sent a receipt to an agent located within thirty miles of his residence; but he had no knowledge of the fact, at least such was the finding of the jury from the evidence." *Insurance Co. v. Doster*, 106 U. S. 30, 1 Sup. Ct. Rep. 18, is somewhat similar as to its facts. The assured was entitled to a dividend on the business of the company, which was set apart to the insured in part discharge of his premium. The company failed to notify him of the amount, and it was the cause of the delay in the payment. In *Insurance Co. v. Block*, 109 Pa. St. 535, 1 Atl. Rep. 523, the premium had been paid, and the question was whether it had been paid to the proper person. In *Insurance Co. v. Hoover*, 113 Pa. St. 591, 8 Atl. Rep. 163, which was the case of a payment of the premium on a fire policy after maturity, there was a course of dealing by which the agent gave the assured a credit in his accounts, and became himself the debtor of the company therefor. This clearly appears from the following extract from the opinion of Mr. Justice Sterrett: "On the trial, evidence was received tending to show that Fredrick, through whom the insurance was placed, was the recognized agent of the company for the purpose of securing risks, receiving and remitting premiums, etc.; that in his dealings with the company he was made its personal debtor for premiums on all policies issued through him, and that he periodically accounted to it therefor, whether the money was received by him from the persons to whom the policies were issued or not; that he made the persons or firms to whom he delivered policies his personal debtors, and dealt with them in that relation, charging them with the premiums on his books, sending them bills in his own name, and making himself responsible to the company for the same; and that the bills for premiums were generally rendered some time during the month after the insurance was effected."

I have not, of course, reviewed all the authorities cited; I have considered the most important. To review them all would protract this opinion to such a length that no one would probably read it. No Pennsylvania case was cited which is in serious conflict with the views above expressed, nor have I been able to find one after a

careful examination of the digests. It is possible I may, in the press of business, have overlooked some such case. We have little leisure to search for cases that are not cited. But I regard the overwhelming weight of authority, both in this State and elsewhere, to be in accord with the principles above stated; moreover, I believe them to be sustained by the sounder reason.

Under the circumstances, we think it was error for the learned judge below to charge the jury as follows: "Therefore, I think the question arises, and it is for you to say, in this case, whether this general superintendent, residing here in Philadelphia, with his principal in Vermont, and in the constant habit of doing this very thing, because we find a number of receipts where he did receive the money subsequent to the time fixed, and it is testified to in this case that he certainly agreed to do it, and had done it in the case of Mr. Lantz, his brother, so that, if the rule was to be enforced as it is written, he would have no right to do this thing which he was in the habit of doing, and that, therefore, it is a question for you to say whether he had any authority; whether the company, having permitted him to do this thing constantly, had not authorized him — the secretary and president had not authorized him — to perform the acts that he was doing." See first assignment. The "thing" which the agent had done and which the company had ratified was the acceptance in three instances of overdue premiums from the assured, he being in full life at the time. Authority beyond this could not be inferred from any act of the company or its agent. It was not denied — indeed, it was expressly admitted — that, had the assured tendered the premium during his life-time, it would have been accepted, and the policy reinstated. No inference can be properly drawn from this, however, that the company would receive the premium after the death of the assured. The learned judge failed to note the difference between the renewal of a lapsed policy by the actual payment and acceptance of the premium and a mere attempt to renew it without any consideration moving from the assured to the company. The one is a completed transaction, and therefore binding; the other is uncompleted, and does not even amount to a contract. The same error runs through the charge. The assignments are all sustained. We think there should have been a binding instruction in favor of the defendant.

Judgment reversed.

STERRETT and CLARK, JJ., dissented.

5. WHAT CONSTITUTES A WAIVER.

CENTRAL CITY INS. CO. v. OATES.

86 ALA. 558. — 1888.

THIS was an action brought by W. J. Oates against the Central City Insurance Company, and was founded on a policy of insurance issued by defendant to plaintiff on a stock of goods owned by him. Defendant pleaded the general issue, and by special pleas set up the defense that defendant had not fulfilled the conditions stipulated in the policy; had not forwarded to the company sworn proof of loss; and had not given the company a certificate of loss by a magistrate. Plaintiff filed his replication, and setting up waiver of such proof and certificate by the company, after having been given notice of the loss, on the ground that the company had made no objection to the notice as forwarded to them, and had not complained to plaintiff of not having received such proof and certificate, but that in the dealings of plaintiff with the agents of the company, and with the company itself, no objection was made as to plaintiff's failure to give such proof and certificate. Defendant demurred to this replication of plaintiff, on the ground that the facts, as set out, constituted no waiver of the conditions of said policy. The court overruled this demurrer, and defendant duly excepted. Among many charges requested by defendant was the following: "That if the jury believe the evidence they must find for the defendant." The court refused to give this charge, and defendant excepted. There was verdict and judgment for plaintiff, and defendant appeals.

SOMERVILLE, J. — The policy of insurance sued on, among other conditions, requires three important steps to be taken by the assured in the event of a loss by fire (1) He must "*forthwith give* notice of said loss to the company *in the city of Selma*;" (2) "as soon after as possible, [he must] *render a particular account of such loss*, signed and sworn to by him" (the assured), stating the origin of the fire, what other insurance he has, if any, his interest in the property, its value, and by whom and for what purpose it was occupied; (3) "he must produce the *certificate* of the nearest disinterested *magistrate* that such officer has examined the circumstances of the loss, and believes that it originated without fraud, and amounted to a specified sum." These three requirements, omitting for the present all mention of others, viz.: (1) *notice* of loss; (2) sworn *proof* of loss; (3) *certificate* of loss by a magistrate — have uniformly been held by the courts to be conditions precedent in policies of insurance like the present one, and satisfactory evidence of compliance with them, in proper time, has been held to be an

essential prerequisite to the right of recovery by the assured, unless such compliance is waived by the insurer. *Wellcome v. Insurance Co.*, 2 Gray, 480; *May, Ins.*, §§ 460, 466; *Insurance Co. v. Felrath*, 77 Ala. 194.

"Forthwith," in all such policies, means without unnecessary delay, or with reasonable diligence, under the circumstances of the particular case. *Insurance Co. v. Kyle*, 11 Mo. 278; s. c., 49 Amer. Dec. 74.

It has been held in one case that delay of eleven days, and in another of eighteen days, in giving notice of loss, is not a compliance with such a requirement, in the absence of excusatory facts explaining the delay. *Trask v. Insurance Co.*, 29 Pa. St. 198; s. c., 72 Amer. Dec. 622; *Edwards v. Insurance Co.*, 75 Pa. St. 380. Where the fire occurred on the 15th, and the plaintiffs, hearing of it on the 18th, gave notice by mail on the 23d, this was held to be a sufficient compliance with a condition requiring notice to be given "forthwith." *Insurance Co. v. Insurance Co.*, 20 Barb. 468. And notice given on the morning after the fire was held sufficient in *Hovey v. Insurance Co.*, 2 Duer, 554. The settled rule in all cases, however, is to construe such requirements liberally in favor of the assured, and strictly against the insurer. *Insurance Co. v. Young*, 58 Ala. 476; *Insurance Co. v. Johnston*, 80 Ala. 467, 2 South. Rep. 125; s. c. 60 Amer. Rep. 112.

It has been held, by this and other courts, that where preliminary proofs of loss are presented to the insurer in due time, and they are defective in any particular, these defects may be waived in either of two modes: (1) By a failure of the insurer to object to them on any ground within a reasonable time after receipt — in other words, by undue length of silence after presentation; or (2) by putting their refusal to pay on any other specified ground than such defect of proof. The reason is that fair dealing entitles the assured to be apprised of such defect, so that he may have an opportunity to remedy it before it is too late. *Insurance Co. v. Felrath*, 77 Ala. 194; *Insurance Co. v. Crandall*, 33 Ala. 9; *Insurance Co. v. McDowell*, 50 Ill. 120; s. c. 99 Amer. Dec. 497; *Insurance Co. v. Kyle*, 49 Amer. Dec. 74, *supra*; *Insurance Co. v. Allen*, 80 Ala. 571, 1 South. Rep. 202.

So, there are cases decided by this and other courts which hold, and properly so, we think, that an entire failure to make any formal proof of loss may sometimes be excused on the principle of waiver or estoppel *in pais*. In *Martin v. Insurance Co.*, 20 Pick. 389, s. c. 32 Amer. Dec. 220; no evidence was offered of any preliminary proofs before bringing the action, but only of an abandonment not accepted, and a demand of payment of the loss. The insurer refused to pay the loss solely on account of the unseaworthiness of the ves-

sel, and in all their communications with the plaintiff made no objection to the want of proof. The court held that the refusal to pay on the ground specified was a fact from which the jury were authorized to infer a waiver of the proof of loss. On like principle, a waiver of preliminary proofs has been inferred from a distinct refusal of the company to pay because the assured had taken other insurance without notice, and "had in other ways acted unfairly." *Insurance Co. v. Neve*, 2 McM. (s. c.) 237. And again, on the ground that no valid contract of insurance had ever been entered into because incomplete at the time of the loss, no objection being made to the want of such proofs *Taylor v. Insurance Co.*, 9 How. (U. S.) 390; *Insurance Co. v. Adler*, 71 Ala. 518. So, where the insurance company subjected the assured to a personal examination under oath, which statement he subscribed as required by the terms of the policy, and no demand was made for formal proofs, it was held that, upon this state of facts, the jury were authorized to find a waiver of such proofs. *Badger v. Insurance Co.*, 49 Wis. 400. The payment by the insurer of a part of the sum agreed to be paid by the policy in case of loss has also been held a waiver of the usual preliminary proofs. *Westlake v. Insurance Co.*, 14 Barb. 206. So, the offer to pay a specified sum, accompanied by a denial of liability for some of the articles as not covered by the policy, without demand of such proofs. *Insurance Co. v. Allen*, 80 Ala. 571, 1 South. Rep. 202.

We can find no case, however, where the mere silence of the insurer has been construed as a waiver of the presentation of preliminary proofs by the insured, where no such proofs, defective or otherwise, have been presented. The policy itself is the most solemn notification possible of the imperative prerequisite of furnishing such proofs. It is there stipulated that they must be furnished as soon as possible after the fire, and this stipulation is a standing notice of the requirement. It stands to reason that this notice need not be reiterated by the insurer, nor any special attention of the assured called to it, unless the particular circumstances of the case render it necessary to fair and honest dealing between the parties. And the authorities accordingly hold that the mere silence of the underwriter or insurer, or his failure to specify the non-production of such preliminary proofs, as an objection to the payment of the loss, is not sufficient evidence to justify a jury in inferring a waiver of the production. *Insurance Co. v. Lawrence*, 2 Pet. (U. S.) 25; *O'Reilly v. Insurance Co.*, 60 N. Y. 169; *Keenan v. Insurance Co.*, 12 Iowa, 126. A like principle was applied in *Insurance Co. v. Kyle*, 11 Mo. 278, s. c. 49 Amer. Dec. 74, where there was a failure on the part of the insurer to object to a notice of loss when it

was received too late. It was suggested by the court that it was not the duty of the company to make any formal objection to the want of notice, and whether they were silent, or made objections on this ground, could not alter the rights of the parties. "Such a doctrine would be in fact," it was said, "implying a *new contract* between the parties from the mere inaction or silence of one party." See also *Patrick v. Insurance Co.*, 43 N. H. 621; s. c. 80 Amer. Dec. 197.

As we have said, the contract exacts (1) a notice of loss forthwith, and (2) proofs of loss as soon thereafter as possible. It is manifest that mere notice of loss is not *proof* of such loss, and cannot ordinarily subserve such purpose; although proof of loss, if made "forthwith," may answer, not only as proof, but as notice. *Wood, Ins.*, § 428; *May, Ins.*, § 460. It has been accordingly held, in recognition of this distinction, that there might be a waiver of the notice of loss, without a waiver of the proof of loss required to be furnished. *Desilver v. Insurance Co.*, 38 Pa. St. 130.

In this case there was notice of loss, but the company received no preliminary proofs. The policy required that such proofs should be rendered to the company, meaning from the context, in the city of Selma, where the notice also was required to be given. The deposit in the post-office of a written statement of loss, made out and sworn to, and addressed to the company at Selma, but never received by them, was not a delivery of such proof to them, and could not operate to fulfill the requirement of the contract that such proofs of loss should be rendered to the company at Selma. *Hodgkins v. Insurance Co.*, 34 Barb. 213.

Waiver is necessarily a matter of mutual intention between the contracting parties in the nature of a new contract between them. In the absence of evidence that the company had ever received any proofs of loss, or knew their contents and defects, if any, it cannot be contended that such defects were waived. There can be no waiver of anything as to the existence of which one is totally ignorant. *Bennecke v. Insurance Co.*, 105 U. S. 355.

In *Dawes v. Insurance Co.*, 7 Cow, 462, it was held that the president of an insurance company, as such, possessed no power to waive full preliminary proofs. In *Insurance Co. v. Young*, 86 Ala. 424, 5 South. Rep. 116, it was decided that a local soliciting agent has no authority, after loss, to waive the breach of any condition in a fire insurance policy. And *Patrick v. Insurance Co.*, 43 N. H. 641, s. c. 80 Amer. Dec. 197, is authority for the proposition that a condition in a policy of insurance, requiring notice of loss to be given within thirty days, is not waived by a vote of the directors of the company to indefinitely postpone the consideration of the loss, which

was tantamount to a refusal to pay anything on account of it, the notice not having been given in due time. The jury were probably justified in coming to the conclusion that the *notice* of loss, under all the circumstances of the case, was given in a reasonable time, and in proper mode. But there were no *proofs of loss* furnished, and no conduct on the company's part from which the jury were authorized to infer a waiver of such proof.

Under a proper application of the foregoing principles, it is our opinion that the defendant's demurrer to the plaintiff's replication should have been sustained, and that the defendant was entitled to have the general affirmative charge given as requested.

Reversed and remanded.¹

ROBINSON *v.* PENNSYLVANIA FIRE INS. CO.

90 ME. 385. — 1897.

WISWELL, J. — * * * As to the second point raised, we quote from the bill of exceptions: "The plaintiff did not within a reasonable time after her loss deliver to the defendant an account of the loss and damage, as required by section 21 of chapter 49 of the Revised Statutes, but claimed that the defendant, by its agents, had waived the delivery of such proof of loss. There was evidence tending to prove that, when the defendant's agents were notified of the loss, they denied that the defendant was liable for such loss on the policy in suit, for the reason that the policy did not cover the goods and chattels, in said new building, destroyed by fire. The plaintiff contended that such denial was a waiver of the proof of loss required by the statute, while it was contended by the defendant that such denial of the plaintiff's claim was not such a waiver."

Upon the question of waiver the presiding justice instructed the jury as follows: "So, gentlemen, you will determine whether or not, from the beginning, the defendant has denied its liability under this policy because they claim it did not cover this property; and, if it has, then, gentlemen, they have waived any proof on the part of the plaintiff, and, as I have said to you, she may recover, provided she satisfies you that the policy covered the property consumed by reason of its being in the building that was mentioned in the policy." We think that this instruction was erroneous. Ordinarily the question as to whether or not there has been a waiver is one of fact for

¹ See also point "3" of the opinion in *Ermentrout v. Co.*, reported herein at p. 487.

the jury. "It is always so whenever it is to be inferred from evidence adduced, or is to be established from the weight of evidence." *Nickerson v. Nickerson*, 80 Me. 100, 12 Atl. 880. It was a question of fact in this case. There was no express waiver. It was therefore for the jury to determine whether, from the acts relied upon and proved, the inference could be properly drawn either that there was an intention upon the part of the insurer to waive its right to have a proof of loss furnished by the insured, or that the denial of liability, for another cause, was of such a character, or made under such circumstances, as to reasonably induce a belief upon the part of the assured that the furnishing of a proof of loss would be a useless formality, and that in relying upon the belief thus induced she neglected to make the required proof of loss within a reasonable time. When there is no express waiver, it is not only necessary for the jury to determine what the facts are which are relied upon for the purpose of showing a waiver, but it is also the peculiar and appropriate province of the jury to determine what inferences are properly deducible from such facts.

That the question whether or not there has been a waiver, where it is a matter of inference, is one of fact for the determination of the jury, is generally, if not universally, held by the courts of this country. It was early so decided in this State in the case of *Manufacturing Co. v. Armstrong*, 17 Me. 34, in which it was held, "Whether there was or was not such a waiver is for the decision of the jury, and the presiding judge cannot order a nonsuit, even if the court should be of opinion that the evidence of waiver would not warrant a verdict." This case was cited and approved in *Nickerson v. Nickerson*, *supra*. In *Smith v. Insurance Co.*, 87 Me. 190, 32 Atl. 872, the plaintiff's counsel requested the presiding judge to rule as a matter of law that the defendant had waived their right to arbitration. The court declined to do this, but, explaining what might constitute a waiver, it submitted the question to the jury to determine for themselves. The ruling was sustained, although there was no discussion of the question as to whether this was within the province of court or jury. In *Fitch v. Iron Works*, 29 Conn. 91, it was held that this was a question for the jury, "because a question of waiver is one of intention, and most usually depends on acts or declarations which, in regard to their character, are of an inconclusive or doubtful nature, and furnishes only evidence of intention and grounds of inference and deduction which it is the appropriate province of the jury only to consider." In *Fox v. Harding*, 7 Cush. 516, it is said: "It may be laid down as a general rule that the question whether the evidence in any case establishes a waiver of any legal right by

a party is one of fact, to be settled by the verdict of a jury. * * * In all questions of this sort so much depends on the intent with which parties act that it would be impossible for courts to establish any certain rule by which all cases could be governed. They must necessarily be left to the determination of juries, whose peculiar province it is to ascertain the intent of parties as gathered from the various facts and circumstances proved in each particular case." In *Railroad Co. v. Paige*, 135 Mass. 145, it is said: "Taking the view most favorable to the defendant, it was a question of fact, upon the evidence, whether he had not thus waived his rights upon which the plaintiff would, in a jury trial, have the right to go to the jury. The ruling, therefore, that as matter of law the defendant was entitled, upon the evidence, to recover under his declaration in set-off, without passing upon this disputed question of fact, was error." Numerous other cases to the same effect might be cited, but it is unnecessary.

Nor, in our opinion, was the instruction complained of a strictly correct statement of the law. It was too broad and unqualified. The mere denial by the company of its liability, because of the claim that the property destroyed was not covered by the policy, was not, in and of itself, a waiver. It would be evidence from which a jury, in connection with all the other facts and circumstances, might draw the inference that a waiver was intended; or it might have the effect of a waiver, under certain circumstances, upon the doctrine of estoppel. A waiver is the intentional relinquishment of a known right. And even where a waiver is not intended, the language, conduct, or even the silence of one party to a contract may be of such a character and under such circumstances as to induce the other party to believe that a waiver was intended; and if, acting upon this belief, he fails to perform a required condition, then the party whose conduct caused the belief will be estopped from taking any advantage thus obtained. Upon the same principle it has very generally been held that if an insurance company denies its liability upon other ground, and thereby causes the insured to believe that a compliance with the condition to furnish proofs of loss would be unavailing and but a useless formality, and he for that reason neglects to comply with such condition, it will be considered as equivalent to a waiver.

It is true that many decided cases contain statements to the effect that a general denial by an insurance company of all liability waives notice and proof of loss, but an examination of these cases will show that they very generally rest upon the essential principles of estoppel. And while this is not universally true, and although some courts assert that this rule is independent of, or at least not necessarily

based upon, the doctrine of estoppel, we think that upon principle there can be no waiver unless one was intended, or unless the circumstances create an estoppel. In *Welsh v. Corporation*, 151 Pa. St. 607, 25 Atl. 142, it was decided that when the insured, in good faith and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy as to proofs of loss, good faith equally requires that the company shall notify him promptly of any objections thereto, so as to give him an opportunity to obviate them, and that mere silence may so mislead him, to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel. In the opinion in that case it is said: "The plaintiff's fifth point, however, that if the authorized agent of the defendant refused payment of the loss, giving a specified reason therefor to the plaintiff, they must be confined to that reason upon the trial, and the jury should disregard any other defense now made by them, was entirely too broad, and its affirmance, as a general proposition of law, would be clear error. It ignores the elements of estoppel, and lays down a rule without reference to conditions essential to its existence and applicability." And later in the same opinion, in speaking of certain cases in that state, it is said: "All of these cases rest upon the substantial element of estoppel, that the defendant, having led the plaintiff to suppose that a compliance with the preliminary formalities would be unavailing, could not thereafter set up the want of such preliminaries. Of the soundness of that principle there can be no question." In *Insurance Co. v. Eggleston*, 96 U. S. 572, Mr. Justice Bradley, in delivering the opinion of the court, said: "Any course of action on the part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract." In *Insurance Co. v. Potts*, 55 N. J. Law, 158, 26 Atl. 27, 537, the court adopts the language of Mr. Justice Bradley above quoted. In this case the insured procured additional insurance without the written consent of the insurer, as required by the policy. He notified the company, and the company directed its agents to cancel the policy, which they failed to do until after the loss. It was held that the insurer was estopped from setting up a forfeiture, the court saying in its opinion: "The case thus presented would, in my opinion, come within the elemental rule of estoppel, that in dealing with others no one shall be permitted to deny that he intended the natural consequences of his conduct, when such conduct has in fact induced

others to rely upon it to their loss." "In cases like the present it must appear that the insured was misled to his prejudice; and, where no act has been done or left undone by the insured in reliance on the act or nonaction of the insurer, there can be no estoppel. The acts or declarations must have influenced the conduct of the other party to his injury." *Wheaton v. Insurance Co.*, 76 Cal. 415, 18 Pac. 758. In *Butterworth v. Insurance Co.*, 132 Mass. 489, the principle of estoppel is recognized in this language: "No objection is here made to the proofs, but, on the contrary, they are by implication recognized as satisfactory. It is against good faith for the defendant, after thus having lulled the plaintiffs into a feeling of security, to object at the trial that the proofs were not sufficient; and the jury were justified in finding, if not required to find, a waiver by the defendant."

The decisions of the New York court have been somewhat conflicting upon this question, but in *Devens v. Insurance Co.*, 83 N. Y. 168, the Court of Appeals distinctly recognizes this doctrine in the following language: "The doctrine of waiver was, we think, properly applied in that case but it should not be extended so as to deprive a party of his defense merely because he negligently or incautiously, when a claim is first presented, while denying his liability, omits to disclose the ground of his defense, or states another ground than that upon which he finally relies. There must, in addition, be evidence from which the jury would be justified in finding that with full knowledge of the facts there was an intention to abandon, or not to insist upon, the particular defense afterwards relied upon, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury."

The doctrine is thus stated in Bigelow, Estop., p. 660: "Frequent illustrations of the estoppel in question are to be found in cases of actions upon insurance policies, where the conduct of the underwriter has been such as reasonably to lead the assured to believe, until too late, that a requirement of the policy, as, *e. g.*, in regard to the proofs of loss or the prompt payment of the premium or of a premium note, will not be required. If the assured, as a sensible man, has really been misled, it would be a fraud upon him to insist upon the term or condition forborne." And on page 664 the same author says: "The question to be considered in such cases, it will be seen, is whether the conduct of the one party had had a natural tendency to prevent the other from doing what he has undertaken to do, and has not done."

For the reasons given, and upon the authority of the cases cited, this exception must be sustained.

Exceptions sustained.

PART VIII.

INSURANCE AGENTS.

a. Scope of Authority.

1. LOCAL AGENTS.

MILLVILLE MUTUAL MARINE AND FIRE INS. CO. *v.* MECHANICS', ETC., ASSOC.

43 N. J. L. 652. — 1881.

VAN SYCKEL, J. — The plaintiff held the policy of insurance in this case as collateral security for a mortgage debt, and instituted this suit to recover loss by fire. The property was insured in the name of George H. Stinson, the then owner. After the assignment of the policy to the plaintiff, Stinson decided to convey the property to his wife, and to effect his purpose made a conveyance of the premises to Winslow Beynor, who thereupon conveyed to the wife. The defense is that this conveyance was made without the consent or approval of the defendant company, and without any assignment of the policy approved and consented to by the defendant within thirty days after the alienation, or at any time. It is conceded that by the express terms of the policy a change in the title of the insured premises, without the consent of the insurer, makes the policy void.

The question in the case is, whether notice of alienation was given to the company, and whether they assented to it or waived the condition of the policy in this respect. The case turns upon the authority with which the company's agent shall be held to be invested. A special agency strictly exists where authority is given to do a single act or designated specific acts. A general agency arises where there is a grant of power to do all acts connected with a particular branch of business, or a general authority in regard to a particular transaction. A general authority may arise from a general employment in a specific capacity. The rule is well stated in Story on Agency, § 19, thus: "On the other hand (although this is

not the ordinary commercial sense), a person is sometimes said to be a special agent, whose authority, although it extends to do acts generally in a particular business or employment, is yet qualified and restrained by limitations, conditions and instructions of a special nature. In such a case the agent is deemed, as to persons dealing with him in ignorance of such special limitations, to be a general agent; although as between himself and his principal, he may be deemed a special agent. In short, the true distinction (as generally recognized) between a general and special agent (or, as he is sometimes called, a particular agent), is this: A general agency does not import an unqualified authority, but that which is derived from a multitude of instances, or in the general course of an employment or business; whereas, a special agency is confined to an individual transaction." Such general authority enables the agent to bind the principal, without orders, in dealing with those who, acting in good faith, have no notice of the want of lawful power in the agent.

One who intrusts authority to another is bound by all that is done by the agent within the scope of his apparent power, and cannot screen himself from the consequences thereof upon the ground that no authority was given to do the particular act. If a person is in fact, or apparently, a general agent of the company, he stands in the place of the company to the assured, and in the absence of any limitation of his power made known to the assured, any act done by him within the apparent range of his employment, before or after the contract is entered into, is binding on the principal. Mr. Wood, in his work on Fire Insurance, § 392, forcibly remarks: "It would be disastrous to commercial, as well as other interests, if a person, by acting through the agency of another, could shield himself from liability for such person's acts, *ad libitum*. Fortunately no such rule exists, and he who intrusts authority to another, in whatever department of business, is bound by all that is done by his agent within the scope of his apparent power, and cannot screen himself from the consequences thereof upon the ground that no authority, in fact, was given him to do the particular act, unless the act was clearly in excess of his apparent authority, or was done under such circumstances as put the person dealing with him upon inquiry as to the agent's real authority." The diversity in the cases, which it will be futile to attempt to reconcile, arises not in the comprehension of what is the true rule, but from the application of it to particular circumstances.

In this case D. C. Heminway, who was the company's agent at Newfield, in this state, wrote the policy and delivered it to Stinson.

Upon the policy, when delivered, was this indorsement: "D. C. Heminway, agent;" the word "agent" being printed on the form. The policy itself contained no notice that there was any limitation upon the power of the agent, and there was no evidence to charge the insured with knowledge of any restriction. Under such circumstances, with what authority will the law presume the agent was invested? The true answer to this inquiry will correctly solve this controversy. He must either be treated as a special agent or as a general agent, in the sense in which that term has hereinbefore been defined. There is no middle ground to stand upon. If it is deemed to be a special agency, then it was the duty of the insured to acquaint himself with the limitations by which the power of the agent was circumscribed before he dealt with him. This would render insurance through an agency wholly delusive, and prove a mere snare to the unwary; for even the right to deliver the policy might be hampered with secret instructions. The company said to the insured, "This is my agent; you may deal with him as such," not intimating that there was any qualification of or restraint upon his power. Being held out as an agent, without the expression of any limitation, public policy and good faith unite in requiring that general authority shall be ascribed to him as the defendant's representative.

In *Insurance Company v. Wilkinson*, 13 Wall. 234, Mr. Justice Miller says, in speaking of insurance agents: "The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who in this manner is induced to take out a policy rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent, who has persuaded him to effect insurance, as the full and complete representative of the company, in all that is said or done in making the contract. Has he not a right so to regard him? The powers of the agent are, *prima facie*, co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals." That the authority of the agent will be assumed to be general in all matters relating to the effecting of the insurance was maintained by Justice Sharswood, in *Mentz v. Lancaster Firs Ins. Co.*, 79 Penna. St. 476, a case which is cited with approbation by Chancellor Runyon, in *Combs v. Shrewsbury Ins. Co.*, 7 Stew. 403. This is simply another form of expressing the idea that an agent shall be presumed to have the power with which he is apparently clothed; that the principal shall not be permitted to say to the public in a general way, without any qualification, "This is my agent," and at the same time charge one who, at

a remote point, deals with him in that capacity, with the duty of first ascertaining the precise limit of his authority.

In *Merserau v. Phoenix Mutual Life Ins. Co.*, 66 N. Y. 274, Justice Allen says: "The rule is well expressed in *Insurance Company v. Wilkinson*, 13 Wall. 222, and *Miller v. Phoenix Ins. Co.*, 27 Iowa, 203. Insurance companies doing business by agencies at a distance from their principal place of business are responsible for the acts of the agent, within the general scope of the business intrusted to his care, and no limitations of his authority, will be binding on parties with whom he deals, which are not brought to their knowledge. It is upon and within this general principle that insurance companies have been held bound by the acts of their agents in dispensing with or varying the terms and conditions of their policies of insurance." In that case the authority of the agent was held to be circumscribed, only because the policy itself contained an express limitation of his power. That, in the view of this court, the power will be regarded as general, in the absence of express limitations in the policy or of notice to the assured of the existence of a restriction, may be inferred from the case of *Catoir v. American Ins. Co.*, 4 Vroom, 487. There, Mr. Justice Bedle, in delivering the opinion of the court, denied the right of the agent to dispense with a condition in the policy exclusively, for the reason that the policy contained an express limitation of authority. Heminway must, therefore, be considered the general agent of the defendant company, invested with the right to exercise a power commensurate with the business apparently intrusted to his care. That such an agent may assent to alienation and waive conditions on behalf of an insurance company is established by numerous authorities. *Woodbury Savings Bank v. Charter Oak Co.*, 31 Conn. 517; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; *Goit v. National Ins. Co.*, 25 Barb. 189; *Sheldon v. Atlantic Ins. Co.*, 26 N. Y. 460; *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117; *Merserau v. Phoenix Mut. Co.*, 66 N. Y. 274; *Durar v. Hudson County Mutual*, 4 Zab. 171; *Shearman v. Niagara Ins. Co.*, 46 N. Y. 526; *Wood on Fire Ins.*, §§ 391. 393. It was within the power of the agent in this case, under the apparent authority intrusted to him, to waive the conditions of the contract, to receive notice of the alienation and assent to it on behalf of the principal.

The question remains whether there was evidence from which the jury might lawfully find such waiver. Heminway testified that inquiry was made whether it was not necessary to notify the company of the change in the title, and Stinson then asked him if he would attend to the business, and he said he would attend to it, and it would be all right. The conveyance of the property to the wife

had been previously executed under the direction of Heminway. Another witness testified that after the transfer of title Stinson asked Heminway if he was the agent of the company, and he replied that he was. Stinson then asked him if he would notify the company of the transfer, and he said: "I will attend to it, and it will be all right." Heminway having power not only to receive notice of alienation, but also to waive the condition of the policy on behalf of the company, this conversation must be treated as if it had been addressed by the insured to the board of directors, and the replies of the agent, as the replies of the directors to the insured. In this aspect of the case it is manifest that the insured was justified in drawing the inference that nothing more was necessary to be done on his part to continue the life of the policy. Until notice was given to him to do some further act he had a right to rest securely upon the agent's assurance. The company cannot thus lull their policy-holder into a false security, and take advantage of an omission on his part thereby induced, to work a forfeiture of their contract.

The trial judge submitted the case to the jury with proper instructions upon these questions of law.

The judgment below should be affirmed.

For affirmance — The CHANCELLOR, CHIEF JUSTICE, DEPUE, DIXON, KNAPP, SCUDDER, VAN SYCKEL, CLEMENT, COLE, DODD, GREEN — 11.

For reversal — MAGIE, REED, WHITAKER — 3.

BECK, J., IN VIELE *v.* GERMANIA INSURANCE CO.¹

26 LA. 1, 57. — 1868.

VI. We approach the consideration of the questions involving the power of the agent of the defendant to dispense with the conditions of the policy or to waive the forfeiture resulting from the breach thereof. Defendant's counsel contend that, as shown by the policy, the agent possessed no power to assent to an increase of risk except in writing, and that, in order to bind the company by his acts, declarations or agreement, dispensing with the conditions or waiving the forfeiture, his authority so to do must be expressly proved.

There was evidence tending to prove that the agent had full power to effect contracts of insurance, to fix rates of premium, to give consent to the increase of risk and change of occupation of build-

¹ The part of the opinion treating of waiver generally, is printed herein at p. 417.

ings insured, to cancel policies in his discretion, and that in the prosecution of their business it was the custom of agents of insurance companies to exercise supervision over property covered by policies issued at their respective agencies during the term of insurance. The instructions to the jury, and the rulings upon objections to evidence, in effect, hold that the authority of the agent to waive forfeitures and dispense with conditions may be sufficiently shown by proof of the possession and exercise of the powers above stated, and that express authority need not be shown in order to bind the defendant thereby. This we conceive to be the law. By proof of the possession of the powers aforesaid, the authority of the agent is shown to be in fact of the broadest and most plenary character. It is difficult to conceive of an act in the prosecution of the business of insurance, which the officers of the companies can do, that cannot be done by the agent. He is provided with blank policies whereby he is enabled to enter into the contract of insurance. These blank instruments are in no sense contracts until signed by him, for it is expressly provided therein that they "shall not be valid unless countersigned by the duly authorized agent of said companies at Davenport, Iowa."

Such is the express provision of the policy upon which this suit is brought, and there is not one word of limitation upon the authority of the agent contained in it. No attempt was made to prove knowledge on the part of the assured of any limitation of the power of the agent further than by the policy itself, and a general custom or rule of insurance companies and agents that no change can be made by agents in the printed conditions of the policy. The effect of such limitation will be hereafter noticed. The powers of the agent, then, are those of a general agent, and the companies are bound by his acts which are within the scope of the general authority he possesses, even though he violates limitations upon that authority which are not brought home to the knowledge of the party with whom he deals. Story on Agency, §§ 126, 134; *Keenan v. Mo. State Mut. Ins. Co.*, 12 Iowa, 131; *City of Davenport v. Peoria Ins. Co.*, 17 Id. 276; *Warner v. Peoria Ins. Co.*, 14 Wis. 318, 323; *North Berwick Co. v. N. E. F. & M. Ins. Co.*, 52 Maine, 336; *Post v. Aetna Ins. Co.*, 43 Barb. 351; *Sheldon v. Atlantic Ins. Co.*, 26 N. Y. 460.

VII. This brings us to inquire what powers may be exercised by the agent within the scope of his general authority. Under this general authority he has power to conduct the business of insurance of his principals at the city of Davenport. This is the aggregation of all his powers, and he possesses implied authority to do all things proper and necessary in the prosecution of that business, subject, of

course, to limitations imposed by his principals and known to those with whom he deals. These incidental powers may be numerous, and their enumeration is not necessary. Among others, he has the power to assent to the increase of the risk and to a change of occupancy of property insured, and to cancel policies on account of increase of risks or for any other reason. In the exercise of these powers he is guided by his own discretion, which, it is presumed, will be exercised for the best interest of his principals. He has also all the powers which, by the usages of the business, are properly and ordinarily exercised by agents engaged therein. Story on Agency, §§ 77, 106.

It appears that insurance agents usually exercise supervision over the property insured by them, and this necessarily results from the character of the business and their authority to cancel policies on account of increase of risk. The agent is charged, by the terms of the policy on which this suit is based, with the power to determine whether the risk is increased. If he so determines, he may cancel the policy and put an end to the contract. This involves the necessity of examination of the condition of the insured property during the life of the policy, and constant watchfulness to protect the interest of the underwriters. If he determines that the risk is increased, such determination is final, for it seems the assured has no appeal therefrom and no redress for loss that may be sustained thereby. Such being the great, and in some respects extraordinary, power of the agent, it follows that he is clothed with the power to dispense with conditions and waive the effects of breaches thereof, in contracts of insurance made by him. These powers are necessary incidents of his general authority, and without their exercise he could not act to its full extent. If he can determine that the conditions of the contract have been broken, surely he can also determine that they have not been broken. If he can put an end to the contract because of the increase of the risk, and the consequent forfeiture, certainly he can waive that forfeiture. If, possessing such full authority to make the contract, determine that it is performed, and to put an end to it, he cannot dispense with its conditions after it is executed, the rules of law controlling agents generally and all kinds of contracts, must be held not applicable to insurance policies and insurance agents. These companies have no way of dealing with their customers and the public, except through their agents. They are incorporations existing under the laws of another State. Practically those powers can only be exercised by agents. They are inherent in the corporations, whose interest as well as fair dealing towards others (as it did in the case

before us) may require their exercise. The agents, therefore, must be held to have full authority to dispense with the conditions of policies, after their execution, and to waive forfeitures for breaches thereof.

As we have already intimated, the law, in its application to other kinds of contracts and to agents transacting other kinds of business fully sustains the doctrines we have announced. This may readily be illustrated by facts disclosed by the record. The owner of the property upon which the policy in question was issued was a non-resident of the State, and the business was transacted for him by an agent, who, it seems, exercised general powers in all matters pertaining to the property. Now, suppose this agent had executed a contract for the rebuilding of the property burned, or his principal had executed it, and it was delivered by the agent, blanks being filled by him under proper authority, with the name of the other contracting party, sums to be paid, etc. This contract contained many conditions, as we may suppose, for the benefit of the property owner, and the agent was authorized to assent in writing to the dispensation of certain of them, and the power to put an end to the contract in case of the failure of the other party to comply with its conditions. During the progress of the work questions arose whether certain things done or omitted to be done by the builder were in violation of the conditions of the contract. The agent, as to whose power not one word of limitation existed in the contract, or was otherwise known to the builder, asserts that the matters in question are not in violation of the contract, and treats it as complied with, or verbally assents to the dispensation of certain conditions. When the building is completed, in accordance with the contract as thus modified, the principal refuses to pay the sum agreed on, because of non-compliance on the part of the builder with the conditions thus waived by the agent. Upon no recognized rules of law could this defense be sustained, and we would have no difficulty in finding ample authorities in support of the doctrine that the waiver of forfeitures by reason of the breaches of the conditions and the dispensation of the conditions by the agent were binding on the principal. This supposed case is not distinguishable upon principle from the case disclosed by the record.

The views above advanced are fully sustained by the more recent decisions of the courts. In the *Peoria Fire and Marine Ins. Co. v. Hull*, 12 Mich. 213, the knowledge of the agent when the policy was issued that gunpowder was kept on the premises insured was held to be a waiver of a condition prohibiting the keeping of it without written permission. In *Warner v. The Peoria Fire and Marine Ins.*

Co., 14 Wis. 319, the policy required notice to be given of additional insurance, and consent thereto indorsed on the policy. The agent indorsed a waiver of this condition as follows: "Other insurance permitted without notice until required." The court held this to be a sufficient waiver, and that the agent had authority to make it. In the *N. E. Fire and Marine Ins. Co. v. Schettler*, 38 Ill. 170, the agent, upon the receipt of additional premium, gave permission, indorsed on the policy, for the removal of the building and goods to another lot. In a suit upon the policy the insurance company claimed that the agent had no power to consent to the removal of the property. The court held that the power will be presumed without proof. The following additional authorities support the doctrine we have above announced: *Sanford v. Handy*, 23 Wend. 260; *Conover v. Mutual Ins. Co.*, 1 Comst. 290; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Plumb v. Cattaraugus Ins. Co.*, 18 Id. 392; *Sheldon v. Atlantic Fire and Mutual Ins. Co.*, 26 Id. 465. The cases cited in prior pages in support of the positions that there may be a waiver of a breach of the conditions of a policy, and that such waiver may be by parol or presumed from the acts of the parties, sustain the point here made; the waiver in those cases being generally, if not all, made by agents.¹

It is not to be disguised that, upon this question, there is a very great conflict of authorities, some cases restricting the power of the agents to the most narrow limits of the express terms of their appointments, and circumscribing it strictly by the restrictions imposed by the principals, the insurance companies. But the more recent cases support the contrary view, and are in consonance with the doctrines we have attempted to maintain in this opinion.

As an illustration of the progress of the authorities upon this question it may be mentioned that *Rowley v. The Empire Ins. Co.*, above cited, which was decided in 1867, overrules five prior cases adjudged in the courts of New York, and is supported by only one older case in the reports of that State, viz., *Plumb v. The Cattaraugus Ins. Co.*, 18 N. Y. 392. These latter decisions are in harmony with reason and sound public policy, in view of the manner of conducting the business of insurance through a system of agencies far distant from the place of business of the corporations. While it is true that these companies transact business only through their agents at distant points, it is also true that much of their business is acquired through the diligence, skill and capacity of these agents, and that parties effecting insurance rely in a great measure upon the

¹ See *ante*, p. 420, and following.

representations made by them as to the rights and obligations of the respective parties to the policies, and are controlled in the care of the insured property by their directions. The acts of these agents, in all matters pertaining to the proper business they are appointed to transact, should bind their principals, unless contrary to restrictions of their powers, brought to the knowledge of those with whom they deal.

It is argued that, inasmuch as by the restrictions imposed on the power of the agent by custom, as well as by the rules of the company, he can make no change in the printed conditions of the policy, therefore he had no authority to waive a forfeiture of such terms, or dispense with their performance. Without determining whether this could be done by agreement at the time the policy was issued, we are clearly of the opinion that such restriction of authority in no way affects his power so to do after the policy is issued, in a proper case, and without fraud on his part or by the assured. The distinctions between omitting a condition required by the terms of his authority and by custom to be introduced into the policy and the waiver of such condition for a proper cause, after the policy had been executed are obvious.

It has been held that an agent intrusted with blank policies to be filled up and countersigned by him may bind the underwriter by new clauses or conditions inserted by the agent before issuing the policy. 2 Phillips' Ins. 528, § 1877; *Gloucester Manufacturing Co. v. Howard*, 5 Gray 497.

DEVENS, J., IN *KYTE v. COMMERCIAL UNION
ASSURANCE CO.*

144 MASS. 43, 45. — 1887.

IN regard to the policy upon the house, other questions are presented. The defendant had offered evidence that the house was used by the plaintiff, during the time covered by the policy, for the illegal sale of intoxicating liquors; and requested a ruling that, if this were the case, the plaintiff could not recover. This ruling was refused, and the exception thereto is not now insisted on. The jury were, in this connection, instructed that, if there was such a change in the use of the house and the manner of its occupation (it having been insured as a dwelling house), as to increase the risk, without the knowledge of the defendant, this would affect the policy.

The plaintiff then offered the evidence of Alexander Blaney, the local agent of the defendant, who was also chairman of the select-

men of Natick, that the plaintiff had, during the time covered by the policy, received a victualler's license, and one to sell spirituous liquors of all kinds; and that he informed the plaintiff, on granting the license, that he could continue under the policies of insurance as they then existed, although he would have to charge him more the next time. The plaintiff, as well as Blaney, testified that, at the time of obtaining the license as a victualler and also to sell liquor, or at some other time, it was agreed that this would not affect anything during the life of the policy, but that Blaney would not give another on the same terms. Upon this evidence the defendant requested the court to instruct the jury, in substance, that a local agent, with authority to receive premiums and issue policies, had no authority, as such, to waive the terms and conditions of the policy, or to waive the condition in the policy which required the written or printed assent of the company to any change in "the situation or circumstances affecting the risk." To these instructions the defendant was entitled. They correctly state the law, and were called for by the evidence. An agent to receive premiums and issue policies is not, independently of evidence showing that he has a much larger authority than this, empowered to waive conditions so important that parties have seen fit to incorporate them into their contract. Some additional evidence must be offered, as that he had been held out by the company as possessing some authority, or that the company had so ratified similar acts, or had so conducted itself in regard to his other transactions, that the insured was justified in believing that he had such authority. *Tate v. Citizens' Ins. Co.*, 13 Gray, 79; *Harrison v. City Ins. Co.*, 9 Allen, 231; *Lohnes v. Ins. Co. of North America*, 121 Mass. 439. Nor, even if the agent had the fullest authority, could the conditions of the policy be waived except in the manner in which they provide for such waiver. A company which has seen fit to prescribe that the terms and conditions of its policy shall only be waived by its written or printed assent, has prescribed only a reasonable rule to guard against the uncertainties of oral evidence, and by this the insured has assented to be bound. *Hale v. Mechanics' Ins. Co.*, 6 Gray, 169; *Worcester Bank v. Hartford Ins. Co.*, 11 Cush. 265. Upon this point the case was submitted by the learned judge to the jury only upon the question whether the plaintiff had acted in good faith. This was erroneous, for the plaintiff might have acted in entire good faith, and honestly believed that his change in the occupation of the premises insured was justified upon the oral permission of an agent without authority for any such purpose, and yet by such change have avoided his policy.

DRYER *v.* SECURITY FIRE INSURANCE CO.

94 LA. 471. — 1895.

ACTION at law to recover the amount of a loss alleged to have been covered by a policy of insurance issued by the defendant. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals. Reversed.

ROBINSON, J. — The defendant issued to the plaintiff a policy insuring him against loss or damage by fire, to the amount of \$400, on household furniture, beds, bedding, sewing machine, wearing apparel, and provisions. During the life of the policy, property it was designed to cover, to the amount of \$340, was destroyed by fire. The defendant resists payment on the ground that the property insured was covered by the policy only when on the premises therein described, and that it was five miles from them when destroyed. The policy was issued on a written application of the plaintiff, which was prepared by an agent of the defendant named Adams. The application described the property insured as situate on and confined to premises on a section specified, and that description was carried into the policy. It may be conceded, for the purposes of this appeal, that, according to the terms of the policy, it covered the property in question only when on the premises described; and it is admitted that the property was five miles from them when destroyed, although in the same county. The plaintiff is a German, unable to read or write the English language. The application was signed in October, 1889, and asked for insurance for the term of five years from the first day of that month. The policy was issued as asked in the application. At that time the plaintiff occupied the premises described in the application, as a tenant, and his lease for them expired on the first day of the next March. He testifies that when the application was prepared he told Adams that he would have to move on the first of March, and had better wait before insuring until he was settled; that Adams told him it would make no difference, so long as he remained in the county; that Adams said he "would fix it all right for him, so that it would be effectual wherever he might move to in the county." The application was then executed, but was not read by nor to the plaintiff. He had no knowledge before the fire that the policy did not cover the property excepting while it was in the premises he occupied when insured.

Adams denies some of the statements made by plaintiff, and claims that he told the plaintiff that in case of a change in location he must notify the company, but the jury was authorized to find the facts to be as testified by the plaintiff. The defendant contends that the plaintiff is not entitled to recover, even though it be con-

ceded that his claims in regard to the statements of Adams are well founded, for the reason that Adams was a soliciting agent only, without power to make contracts for his company. It cannot be claimed that the evidence shows the authority of Adams to have been greater than that of a soliciting agent. It does not appear that he had power to do more than to obtain applications for insurance, and forward them, with premiums, to the defendant. Certainly it is not shown that he had any power to agree that a policy would be issued, on the application of the plaintiff, which would cover the property insured, wherever it might be, in Clayton county. It is the well-settled rule in this State that the insurance company is bound by the knowledge of material facts which the soliciting agent possesses when he takes an application for insurance. If the applicant answers correctly the questions asked by the agent, he has a right to rely upon the latter to so prepare the application that it will properly state the facts of which the principal wishes to be advised before issuing the policy. If the agent prepares the application, but fails to have it show material facts, and the applicant is blameless, the failure of the agent is chargeable to the company, and furnishes no ground upon which it can avoid liability. *Jamison v. Insurance Co.*, 85 Iowa, 233, 52 N. W. 185, and cases therein cited; *Reynolds v. Insurance Co.*, 80 Iowa, 566, 46 N. W. 569; *McComb v. Insurance Co.*, 83 Iowa, 251, 48 N. W. 1038. It was the right of the plaintiff to insure his property only on condition that the insurance should be good wherever the property might be in Clayton county, and it was within the apparent power of the defendant to furnish that kind of insurance. It was a part of the duty of Adams, in preparing the application, to designate in it the place or location where the insured property was to be kept during the life of the policy. He knew that the plaintiff would take insurance only on condition that it should continue good wherever the insured property might be, in Clayton county, during the life of the policy. He knew, for he was told, that plaintiff could not read in the English language. The application was designed to be the proposition of the plaintiff for insurance, and, as the agent prepared it, he should have caused it to express fairly and fully the proposition as made by the plaintiff. Knowing what that was, he volunteered to express it, but failed to do so. If the plaintiff was ignorant of that failure, and was not guilty of culpable negligence in not discovering the omission in the application or policy, it may be that the defendant would be estopped to deny that its policy covered the loss in question. But the District Court instructed the jury as follows: "(8) The plaintiff, however, alleges, in substance, that, at the time he made the

application for said policy, Mr. Adams, who, as agent for said company, solicited said application, represented to the plaintiff, without qualification, that the policy to be issued to him would cover said property, wherever the same might be located in this county, and that he, believing this and relying upon it, was induced to make the application, and accordingly removed the property. The defendant company denies this, and thus is presented the issue which you are to decide. (9) The burden of proof is on the plaintiff to prove, by a preponderance of evidence, that he was deceived by the agent of the company in the manner aforesaid. Unless the plaintiff has so proved this, he cannot recover. If he has so proved this he is entitled to a verdict in his favor. (10). The plaintiff and the agent Adams have both testified. Both agree that the plaintiff told the agent that he was only a tenant, and might want to remove his property. The plaintiff testifies, in substance, that the agent told him, without qualification, that it would be fixed so that he could remove the property to any place in the county, and said nothing about notice to the company. Adams testifies, in substance, that he told the plaintiff that he could remove the property to any place in the county by giving notice to the company. If Adams was right in his testimony, the plaintiff cannot recover. If the plaintiff was right, and if he was misled, as he claims, thereby, the plaintiff can recover." This portion of the charge, in terms, instructed the jury in regard to alleged misrepresentations of the agent, and the reliance of the plaintiff upon them; but its real effect was to instruct the jury that the plaintiff was authorized to rely upon the statements of the agent as to what the policy would cover, or, in other words, that the agent might make a contract which would bind his principal. That this was the natural and legal effect of the language used, cannot, we think, be successfully denied. But as we have seen, Adams appears to have been only a soliciting agent, and if that was his true character it was no part of his duty, and not within the scope of his powers, to contract for his principal, to construe its policies, or to determine their legal effect. As he was a special agent, not clothed with any apparent right to do more than to solicit insurance, and to perform such acts as were incident to that power, the plaintiff was charged with knowledge of the limitations of his agency, and was not authorized to give any contractual effect to the statements he made. His principal was bound by the knowledge he had when the application was prepared and accepted, but not by statements he made outside the scope of his apparent powers. We conclude that the District Court erred in giving the portion of the charge quoted, and its judgment is for that reason reversed.

INSURANCE CO. *v.* WOLFF.

95 U. S. 326. — 1877.

THE Globe Mutual Life Insurance Company of New York, on the 5th of November, 1869, issued to Eliza Garber a policy of insurance for \$5,000 upon the life of her husband, commencing on the first of that month. The premium was payable annually on the first of November. The policy stipulated for the payment of the amount of the insurance within sixty days after due notice and proof of the death of the insured, subject, however, to certain express conditions. One of these conditions provided, that, if the premiums were not paid on or before the days mentioned for their payment, the company should not be liable for the sum insured, or any part of it, and that the policy should cease and determine. Another condition provided, that, if the insured resided in any part of the United States south of the 33d degree of north latitude, except in California, between the first of July and the first of November, without the consent of the company previously given in writing, the policy should be null and void. And the policy declared that agents of the company were not authorized to make, alter, or discharge contracts, or waive forfeitures. The insured died at the city of New Orleans on the 11th of November, 1872. Between the first of July and the first of November of that year he had resided at that city, which is south of the 33d degree of north latitude, without the previous consent in writing of the company; and the annual premium due on the first of that month was not paid on or before that day. Due notice and proof of his death having been given to the company, and payment by it refused, suit was brought by Mrs. Garber in the Circuit Court of St. Louis county, whence it was removed, on the petition of the company, to the Circuit Court of the United States for the Eastern District of Missouri. Judgment was rendered for the plaintiff, and the cause removed here by writ of error. Mrs. Garber died, and Wolff, her executor, was made the defendant in error.

MR. JUSTICE FIELD. — By the residence of the insured within the prohibited district of country during the period designated in the policy without the previous consent of the company, and the failure of the assured to pay the annual premium when it became due, the policy, by its express terms, was forfeited, and the company released from liability, unless the forfeiture was waived by the action of the company, or of its agents authorized to represent it in that respect.

The waiver of the forfeiture for the non-payment of the premium

due on the first of November, 1872, is alleged on the ground that the premium was subsequently paid to an agent of the company, he delivering its receipt for the same, signed by its secretary, and countersigned by the manager and cashier of the local office, the plaintiff contending that the company, by its previous general course of dealing with its agents, and its practice with respect to the policy in suit, had authorized the premiums to be paid and the agent to receive the same after they became due, and thus had waived any right to a strict compliance with the terms of the policy as to the payment of premiums.

The waiver of the forfeiture arising from the residence within the prohibited district between the first of July and November, without the previous consent of the company, is also alleged from the subsequent payment of the premium and its receipt by the local agent, the plaintiff contending that the premium was received with knowledge by the agent of the previous residence of the insured within the prohibited district.

It appears from the record that the deceased was taken sick with the yellow fever at New Orleans, on the 6th or 7th of November, 1872, and died on the 11th of the month, between the hours of eleven and twelve in the forenoon. On the previous day a telegram was sent by Mrs. Garber from New Orleans to a gentleman in St. Louis, directing the latter to go to the agency of the company in that city, at which the policy was issued, and pay the premium due on the first of the month. Accordingly, on the following morning, at about nine o'clock, the premium was paid by this gentleman, and a renewal receipt was thereupon delivered to him. This renewal receipt was dated in New York, and signed by the secretary of the company. It not only acknowledged the receipt of the premium, but it continued the policy in force for another year. The practice of the company was to send to its agents in St. Louis receipts in this form, signed by its secretary, to be countersigned by the local manager and cashier before being used. The receipt given was thus countersigned. The payment was made in the present case to a boy in the office of the agent, and by him the renewal receipt was delivered. It was his habit to receive premiums and deliver the proper renewal receipt in the absence of the agent. In this case the money was given by him on the latter's coming to the office the same morning. The agent credited the amount to the company in his semi-monthly account transmitted to the home office. The gentleman who paid the premium was not aware at the time that the insured was sick, and no inquiries were made by the boy or the agent as to his health. It is conceded that they had no

information on the subject. A few days afterwards, the agent learned of the death of the insured, and of the sickness which was the immediate cause of it, and informed the home office. The company at once telegraphed the agent to return the premium and demand a surrender of the renewal receipt. The money was accordingly tendered to the gentleman who paid it, and a surrender of the renewal receipt demanded; but the tender was not received, nor the receipt returned.

The conditions mentioned in the policy could, of course, be waived by the company, either before or after they were broken; they were inserted for its benefit, and it depended upon its pleasure whether they should be enforced. The difficulty in this case, and in nearly all cases where a waiver is alleged in the absence of written proof of the fact, arises from a consideration of the effect to be given to the acts of agents of the company in their dealings with the assured. Of course, such agents, if they bind the company, must have authority to waive a compliance with the conditions upon a breach of which the forfeiture is claimed, or to waive the forfeiture when incurred, or their acts waiving such compliance or forfeiture must be subsequently approved by the company. The law of agency is the same, whether it be applied to the act of an agent undertaking to continue a policy of insurance, or to any other act for which his principal is sought to be held responsible. The principle that no one shall be permitted to deny that he intended the natural consequences of his acts when he has induced others to rely upon them, is as applicable to insurance companies as it is to individuals, and will serve to solve the difficulty mentioned. This principle is one of sound morals as well as of sound law, and its enforcement tends to uphold good faith and fair dealing. If, therefore, the conduct of the company in its dealings with the assured in this case, and with others similarly situated, has been such as to induce a belief that so much of the contract as provides for a forfeiture if the premium be not paid on the day it is due, would not be enforced if payment were made within a reasonable period afterwards, the company ought not, in common justice, to be permitted to allege such forfeiture against one who has acted upon the belief, and subsequently made the payment. And if the acts creating such belief were done by the agent and were subsequently approved by the company, either expressly or by receiving and retaining the premiums, the same consequences should follow.

This principle applied to the case at bar will render the question presented one of easy solution. The company, notwithstanding the provisions in the policy that its agents were not authorized to waive

forfeitures, sent to them renewal receipts signed by its secretary, to be used when countersigned by its local manager and cashier, leaving their use subject entirely to the judgment of the local agent. The propriety of their use, in the absence of any fraud in the matter, could not afterwards be questioned by the company. Accompanying these receipts was a notice, printed on the same paper, that policies which became null for non-payment might be renewed at the home office, within a reasonable time, upon furnishing satisfactory evidence of good health, such satisfactory evidence being left to the judgment of the local agent, and the renewal by the home office consisting of a receipt signed by its secretary, transmitted to such agent, to be used when countersigned by the local manager and cashier. It was the habit of the agent to give such renewal receipts whenever the premiums were paid after the time stipulated; and his accounts to the home office showed such subsequent payment. His action in this respect was not questioned by the company; and the premiums were retained by it without any pretense that the policies had ceased to be obligatory for want of punctuality in their payment. The mode of dealing by the agent with persons taking out policies at the local office, his use of renewal receipts, his acceptance of premiums after the day on which they were payable, were all known to the home company, and its retention of the premiums thus received was an approval of his acts. So far, then, as the waiver of the forfeiture incurred for non-payment of the premiums is concerned, it is clear that the company, by its course of dealing, had, notwithstanding the provision of the policy, left the matter to be determined by the local agent, to whom the renewal receipts were intrusted.

But, so far as the forfeiture arose from the residence of the insured within the prohibited district, the case is different. There is nothing in the acts of the company which goes to show that it ever authorized its agents to waive a forfeiture thus incurred, or that it ever knew of any residence of the insured within the prohibited district until informed of his death there. In every case where premiums were received after the day they were payable, the fact that a forfeiture had been incurred was made known to the company from the date of the payment, and the retention of the money constituted a waiver of the forfeiture; but no information of a forfeiture on any other ground was imparted by the date of such payment. The agent receiving the premium, in the case at bar, testified that he knew nothing of the residence of the insured within the prohibited district during the excepted period, and the evidence in conflict with his testimony was slight. He knew that the insured

had a place of business there, and that he was permitted to make occasional visits there within that period, and to reside there at other times. Everything produced as evidence of knowledge of residence within the prescribed district is consistent with these occasional visits and residence at other times than during the excepted period. But, even if the agent knew the fact of residence within the excepted period, he could not waive the forfeiture thus incurred, without authority from the company. The policy declared that he was not authorized to waive forfeitures; and to the provision effect must be given, except so far as the subsequent acts of the company permitted it to be disregarded. There is no evidence that the company in any way, directly or indirectly, sanctioned a disregard of the provision with reference to any forfeitures, except such as occurred from non-payment of premiums. As soon as it was informed of the residence of the insured within the prohibited district, it directed a return of the premium subsequently paid. It would be against reason to give to the receipt of the premium by the agent, under the circumstances stated, the efficacy claimed. The court, in its instructions, treated the receipt of the premium by the agent, with knowledge of the previous residence of the insured within the prohibited district, if the agent had such knowledge, as itself a sufficient waiver of the forfeiture incurred, without any evidence of the action of the company when informed of such residence; and in this respect we think the court erred. It is essential that the company should have had some knowledge of the forfeiture, before it can be held to have waived it.

It is true, that, where an agent is charged with the collection of premiums upon policies, it will be presumed that he informs the company of any circumstances coming to his knowledge affecting its liability; and, if subsequently the premiums are received by the company without objection, any forfeiture incurred will be presumed to be waived. But here there was no ground for any inference of this kind from the subsequent action or silence of the company. There was no evidence of a disregard of the condition as to the residence of the insured in any previous year, and, consequently, there could be no inference of a waiver of its breach from a subsequent retention of the premium paid. This is a case where immediate enforcement of the forfeiture incurred was directed when information was received that the condition of the policy in that respect had been broken. Not only should the company have been informed of the forfeiture before it could be held by its action to have waived it, but it should also have been informed of the condition of the health of the insured at the time the premium was tendered, upon the pay-

ment of which the waiver is claimed. The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions. To a just application of this doctrine it is essential that the company sought to be estopped from denying the waiver claimed should be apprised of all the facts; of those which create the forfeiture, and of those which will necessarily influence its judgment in consenting to waive it. The holder of the policy cannot be permitted to conceal from the company an important fact, like that of the insured being *in extremis*, and then to claim a waiver of the forfeiture created by the act which brought the insured to that condition. To permit such concealment, and yet give to the action of the company the same effect as though no concealment were made, would tend to sanction a fraud on the part of the policy-holder, instead of protecting him against the commission of one by the company.

It follows that the judgment must be reversed, and the cause remanded for a new trial; and it is

So ordered.

ERMENTROUT ET AL. v. GIRARD FIRE & MARINE
INS. CO.

63 MINN. 305. — 1895.

APPEAL by plaintiffs from an order denying a motion for a new trial.

MITCHELL, J. — This action was brought on a policy issued by the defendant to the plaintiff Ermentrout, insuring him, to the amount of \$1,000, for one year "against all direct loss or damage by fire," on his "brick, iron-roof, grain warehouse building, and bins therein, including foundations and all permanent fixtures," etc. The only other provisions of the policy involved on this appeal are as follows: "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." "If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company." "The sum for which this company is liable, pursuant to this policy, shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received

by this company, in accordance with the terms of this policy." When the plaintiffs rested, the defendant moved to dismiss the action, for the reason that plaintiffs had failed to establish their cause of action, in that — First, it did not appear that the loss or damage was the direct result of fire; second, that it did appear that the plaintiffs had not given immediate notice of the loss in writing to the company. The judge granted the motion, although placing his decision exclusively on the last ground. Of course, if the action should have been dismissed on either ground, the ruling of the court must be affirmed.

1. [*A digest of that part of the opinion upon the first point — falling building — is given herein, ante, p. 184.*]

2. Seeley & Co., who issued the policy, were the local agents of the defendant, with authority "to receive proposals for insurance * * * within the county of Hennepin, and to receive premiums thereon, and to give receipts and issue policies therefor." It also appeared that these agents had authority to accept applications for insurance, fix the premium or rate of insurance, and fill up, countersign, and issue policies thereon, which they received from the company, signed by its president and secretary. So far as appeared from the evidence, this was the extent of their actual authority, and there was no evidence tending to show that their apparent authority was other or greater than their actual authority. The only evidence of the giving of notice of loss, except the sending of proofs of loss to the general managers of the defendant at Chicago on or after October 9th (received by them on or about October 23d), was to the effect that, within a day or two after the loss, one of the plaintiffs verbally notified Seeley & Co. that "the fire had destroyed the building." Although probably not material, it does not appear that he requested Seeley & Co., to give or forward the notice to the company, or that they promised to do so, or made any reply to the plaintiff. As the loss occurred on the 12th of August, it is clear, under the authorities, that, as a matter of law, the time for giving notice of loss had expired before the proofs of loss were sent to Chicago. It is also settled law that, where the policy requires notice of loss to be given to the insurer within a specified time, such notice is a condition precedent to the right of action on the policy. Hence, for their right of recovery on the policy, the plaintiffs have to rely on the verbal notice given to Seeley & Co.

If Seeley & Co. were the proper parties to whom to give this notice, — in other words, if it was within the scope of their authority to receive notice of loss, — we would not feel any doubt but that if, when they received verbal notice, they made no objection to its

form, they would be deemed to have waived the omission to give it in writing. But it is self-evident that if they had no authority to receive such notice, then they could waive nothing in the matter. Upon this state of facts, it was not within the scope of the authority of Seeley & Co. to receive or waive notice of loss, and hence notice to them was not notice to the company. Even if there could be any doubt of the correctness of this proposition as a new question, it has been too long and too well settled in this State to be now considered open. *Bowlin v. Insurance Co.*, 36 Minn. 433, 31 N. W. 859; *Shapiro v. Insurance Co.*, 51 Minn. 239, 53 N. W. 463; *Shapiro v. St. Paul F. & M. Ins. Co.*, 61 Minn. 135, 63 N. W. 614. But we think the rule is correct upon both principle and authority. It is in accordance with the general principles of the law of agency. It is elementary that a principal is only liable for acts done by his agent within the scope of the authority, actual or apparent, with which the principal has clothed him; that it rests entirely with the principal to determine the extent of the authority which he will give to his agent; also, that every person dealing with an assumed agent is bound, at his peril, to ascertain the nature and extent of the agent's authority.

In insurance cases courts frequently inaccurately classify agents as "local" and "general." But the extent of the territory which is to be the field of his agency is no test of the extent of an agent's authority within that field. His field of operations may include the whole United States, and yet his powers be special and limited. On the other hand, his field of operations may be confined to a single county or city, and yet his authority within that field be unlimited. In the present case there is no question of apparent, as distinguished from actual, authority. The question is simply one of actual authority, express or implied. Authority to act in the matter of a loss under the policy, after it has occurred, is not expressly given. All the authority expressed relates to the making of the contract of insurance. It is a fundamental principle in the law of agency that a delegation of power, unless its extent be otherwise expressly limited, carries with it, as a necessary incident, the power to do all those things which are reasonably necessary to carry into effect the main power expressly conferred. But it is equally fundamental that the power implied shall not be greater than that fairly and legitimately warranted by the facts; in other words, an implied agency is not to be extended by construction beyond the obvious purpose for which the agency was created. We do not think that mere authority to make a contract of insurance carries with it implied authority to act in the matter of a loss under the policy

after it has occurred. If the implied authority extends to accepting notice of the loss, it would logically follow that it also extends to proof of loss, and even to the adjustment of the loss, — a length to which no court has ever gone. The rule which we have adopted is also in accordance with the general current of the authorities. *Lohnes v. Insurance Co.*, 127 Mass. 439; *Smith v. Insurance Co.*, 60 Vt. 682, 15 Atl. 353; *Bush v. Insurance Co.*, 63 N. Y. 531.

Occasional statements in some of the text-books seem to announce a different rule, but they are not borne out by the authorities cited in their support. For example, in Wood, Ins., § 419, it is stated that, "where an agent is intrusted with policies signed in blank, and is authorized to issue them upon the application of parties seeking insurance, he is thereby clothed with apparent authority to bind the party in reference to any condition of the contract, whether precedent or subsequent, and may waive notice of proofs of loss, and may bind the company by his admissions in respect thereto." Upon an examination of the large number of authorities cited in support of the text, it will be found that not one of them tends to support the author's proposition as to proofs of loss, unless it be the *nisi prius* decision in *Idé v. Insurance Co.*, 2 Biss. 333, Fed. Cas. No. 7,001, in which the question is not discussed, no authorities cited, and the statement of facts so meagre that it cannot be ascertained what the evidence was as to the actual or apparent authority of the agent. Most, if not all, of the other cases may be classified as follows: *First.* Cases holding that, where an agent is authorized to make the contract of insurance and issue the policy, the company is bound by his acts, representations, or omissions preceding or accompanying the issuing of the policy. Considered as the statement of a general rule, this is the doctrine of all courts. *Second.* Cases holding that authority to make the original contract of insurance carries with it implied authority to modify or waive any of its conditions while the contract is still current, as by consenting to other insurance, change of risk, etc. This court has adopted this general rule, although some courts do not go that far. *Third.* Cases where the agent had, with the knowledge of the company, been in the habit of receiving notices of loss, proofs of loss, and adjusting losses, and it had thereby clothed him with apparent authority to do these things. *Fourth.* Cases where the authority of the agent to do the particular acts was admitted, or not disputed, and the only question was as to the effect of his acts, as, for example, whether they constituted a waiver.

3. When the general managers received the proofs of loss in October, they wrote to plaintiffs, stating that they were in receipt

of papers purporting to be proofs of loss, but adding: "This is to notify you that we deny any liability under said policy on the part of this company." They did not, however, return the proofs of loss. If the question was one of the sufficiency of the proofs of loss, we have no doubt the conduct of the general managers would have amounted to a waiver of any defect in them, either of form or substance. But this did not amount to any waiver of the prior failure of the plaintiffs to give notice of loss as required by the terms of the policy. It will be observed that by reason of this prior failure the policy was already dead when the proofs of loss were received; also, that in this letter the general managers did not place their denial of liability on any particular ground, but denied all liability generally. What would have been the effect, under the circumstances, of placing their denial of liability upon some specific ground other than the failure to give notice of loss we need not inquire. But there was nothing in the language or conduct of the general managers that could be construed as a waiver of plaintiffs' prior failure to give notice of the loss, by reason of which the policy was already dead. If the policy had been still alive, and the plaintiffs still had time within which to give the notice, or to supply defects in one already given, a different question would be presented, and many of the numerous cases cited by plaintiffs' counsel would have been in point. Our conclusion is that the court was right in dismissing the action, on the ground that plaintiffs had failed to give notice of loss as required by the policy. Order affirmed.

CANTY, J. — I concur in the first division of the foregoing opinion, but not in the second. I am of the opinion that an insurance agent who has authority "to receive proposals for insurance," "receive premiums thereon," "fix the premiums or rate of insurance," and "fill up, countersign, and issue policies of insurance," should be presumed to have authority to receive notice of loss, at least when no higher local authority appears to exist. Especially is this true of the highest local representative of an insurance company in so large and populous a county as Hennepin.

It is a matter of common knowledge that every insurance company depends largely (though perhaps not exclusively) on such agents to furnish it information concerning such losses. Every company doing a considerable amount of business in any locality, especially in a commercial center of any size, must have and always does have the assistance of its local agent in ascertaining the facts concerning the loss, just as much as they have his assistance in obtaining business or determining the character of risks. It is true that an adjuster is often and quite usually sent to examine into the

facts and adjust the loss, but it is almost the invariable custom for the local agent to furnish the company all the facts within his knowledge, and all the facts which he can ascertain, immediately after he learns of the loss, and usually long before the adjuster comes upon the ground. Of course most of this information from the agent to the company is secret and confidential, but it is none the less within the scope of the agent's duties to furnish it. These are things that everybody knows, and what everybody knows the courts should not refuse to know. These are duties which such agents usually perform. It should be presumed that such duties are within the scope of their authority, and if so it should be presumed that they have authority to receive information of such a loss from the insured and transmit it to the company, and that when such information is so received it is their duty so to transmit it.

As far as concerns the authority of such agents generally, there is no clear or well-defined line drawn between matters arising in connection with or accompanying the making of the policy and other matters, except as that line is being drawn by some of the courts. The line which the companies themselves have always drawn is the line between the right to receive and retain premiums and the right to refuse to pay losses. They always admit that their agents have authority to receive such premiums, and always deny that these agents have any authority to waive any forfeiture whatever, whether arising before or after loss, whether arising in connection with the issuing of the policy or in connection with the giving notice of loss. I am of the opinion that notice to the local agent was sufficient notice of loss, and that the retention by the company of the proof of loss subsequently sent it, tended to prove waiver of prior conditions, as well as performance of the condition requiring such proof of loss.

CRITCHETT *v.* AMERICAN INSURANCE CO.

53 LA. 404. — 1880.

ACTION upon a policy of insurance. The defendant alleges that the plaintiff was in default at the time of the loss by reason of the non-payment of an instalment of the premium. For a portion of the premium the company had taken the plaintiff's note, whereby he had obligated himself to pay the company three dollars upon the first day of November, 1876, and the same amount upon the first day of November in each of the three succeeding years. The policy

contained a provision in these words: "If default shall be made by the assured in the payment of any instalment of premium upon the instalment note given for this policy for the space of thirty days after such instalment shall become due, by the terms of such note, then this policy shall be null and void, and this company shall not be liable to pay any loss happening during the continuance of such default in payment of such instalment; but on payment by the assured or his assigns of all instalments of premium due under this policy, or upon the instalment note given therefor, the liability of the company under the policy shall attach, and this policy be in force as to all the losses happening after such payment, unless it shall be inoperative from some other cause." The instalment falling due Nov. 1, 1876, was not paid. The loss occurred March 9, 1877. There was a trial by jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

ADAMS, Ch. J. — The plaintiff claims that he was not in default at the time the loss occurred, notwithstanding the non-payment of the instalment, which, by the terms of his note, fell due on the first day of November, 1876. He claims that the company had extended the time of payment. As evidence of such extension he testified that one Kennedy, the agent of the company at Oskaloosa, near where he resided, agreed with him after the instalment became due to extend the time of payment until he (plaintiff) should receive a certain pension; that he received his pension March 8, 1877, and on the same day went to Kennedy's office to pay the instalment due upon his insurance note, but did not find him, and on the next day, about 4 o'clock in the afternoon, the property insured was destroyed by fire.

The defendant denies that any agreement for extension was made between the plaintiff and Kennedy and introduced Kennedy as a witness who testified that none was made. Upon this point the jury found against the defendant, and the evidence being conflicting, their finding must be taken as conclusive. But the defendant insists that conceding that Kennedy agreed to an extension the defendant would not be bound by it, because Kennedy had no authority to bind the company in that respect, and further, if he had, that the plaintiff cannot recover, because the loss occurred after the time as extended, and the plaintiff had not paid even then. Kennedy's authority was shown by the certificate of his appointment introduced in evidence. From it, it appears that he was authorized to receive applications for insurance, and collect and transmit premiums. Kennedy testified that he was not authorized to issue policies, and it is not pretended that he was. The court

instructed the jury, in substance, that the plaintiff would be entitled to recover if they found that Kennedy agreed to extend the time of payment, and that the loss occurred within such time. The giving of this instruction is assigned as error.

According to the terms of the policy, the company ceased to carry the risk at the end of thirty days from the time the instalment became due. If the company continued to carry it, it was by reason of a contract not contained in the policy, and that contract must have been the alleged contract with Kennedy. Now, what precisely was that contract, taking the plaintiff's statement as to what it was? He says: "He (Kennedy) agreed he would give me time to get my pension." From this it will be seen that Kennedy did not undertake to contract that the company would, without payment, continue to carry the risk after it had ceased by the terms of the policy. It is doubtful, indeed, whether he even meant to bind the company not to enforce payment of the instalment before plaintiff could get his pension. The words do not necessarily mean more than that he would not himself enforce it. But we are of the opinion that if Kennedy had expressly contracted that the company should carry the risk without payment after it had ceased by the terms of the policy, such contract would not have bound the company. There is no pretense that Kennedy had any express authority to bind the company by any contract whatever. He belonged to an extensive and well recognized class of insurance agents from whom the power to make contracts is withheld. If he had the power to contract in the name of the company to carry the risk without payment after it had ceased by the terms of the policy, it is because the law would imply such power from the fact that he was authorized to collect and transmit premiums. But an agent employed to collect a claim does not thereby have authority to bind his principal even to grant an extension of time. *Hutchings v. Munger*, 41 N. Y. 155; *Kirk v. Hiatt*, 2 Carter (Ind.) 323; *Corning v. Strong*, 1 Carter (Ind.) 329. Still less would such agent have authority to bind his principal by a contract of insurance. We have seen no case where the doctrine contended for by the plaintiff has been held. We do not say that where a policy is delivered by an agent without the prepayment of the premium it will not take effect even though the agent have no authority to pass upon and accept the risk, even though the policy provides that it shall not take effect unless the premium is prepaid. Where an agent is intrusted with a policy for the purpose of delivering it, and does deliver it, though in violation of a provision of the policy as to prepayment, it has been held that the assured has a right to assume that prepayment has been waived.

Young v. Hartford Fire Ins. Co., 45 Iowa, 377; *Bowman v. Agricultural Ins. Co.*, 59 N. Y. 521; *Mississippi Valley Ins. Co. v. Neyland*, 9 Bush. 430; *Sheldon v. Conn. Mu. Ins. Co.*, 25 Conn. 9.

But the waiver rests not simply upon something said by the agent which could be construed into an agreement of waiver but upon something done by the agent which he was employed to do. The authorities all agree that a mere agreement to waive prepayment will not put a policy in force where it is not delivered. It is therefore the delivery of the policy which constitutes the ground of waiver. It is true that in *Hallock v. Commercial Insurance Co.*, 2 Dutcher, 268, a recovery was allowed although the premium had not been paid nor the policy delivered. But the agreement for the insurance had been made *and the premium tendered*, which the agent declined to receive because the policy was not made out. In *Trustees of Baptist Church v. Brooklyn Ins. Co.*, 19 N. Y. 305, there was a parol contract for a renewal, but no payment of the premium. It was held that the plaintiff was entitled to recover. That case was substantially like the case at bar, except that the contract was made by the *officers of the company* and not by an agent. The principle decided, therefore, was materially different. Nor does the case at bar come within the rule held in *Viele v. Germania Ins. Co.*, 26 Iowa, 9. That was a case where the risk was increased by the act of the assured contrary to the provisions of the policy. It appeared, however, that the agent assented to the use of the premises by reason of which the risk was increased. Such assent was held to be a waiver of the forfeiture. The doctrine of that case is unquestionably correct, but it rests upon the fact that the agent is made the judge as to whether a given use is an increase of risk or not. Mr. Justice Beck, who wrote the opinion, said: "The agent is charged, by the terms of the policy on which the suit is based, with the power to determine whether the risk is increased. If he so determines he may cancel the policy and put an end to the contract. This involves the necessity of examination of the condition of the insured property during the life of the policy, and constant watchfulness to protect the interest of the underwriters. If he determines that the risk is increased such determination is final. Such being the great and extraordinary powers of the agent, it follows that he is clothed with the power to dispense with conditions and waive the effect of breaches thereof in contracts of insurance made by him. If he can determine that the conditions of the contract have been broken, surely he can also determine that they have not been broken."

In our opinion there is nothing in this doctrine that affords sup-

port to the proposition that an agent who has not the power to make the contract of insurance can bind the company by his contract to an indefinite postponement of the payment of a renewal premium, and keep the policy in force in contravention of its provisions. In *Bouton v. The American Mutual Life Insurance Company*, 25 Conn. 542, the premium was actually paid to the agent, though after the day it fell due. It was held that though the agent had power to make the contract of insurance, and had power to receive the premium when due, he had no power without an express authorization to bind the company by receiving it after it was due. Substantially the same doctrine was held by implication in *Insurance Company v. Norton*, 96 U. S. 234. In that case a recovery was allowed where the agent had extended the time of payment of premium, but the right of recovery was made to turn upon the ground that the jury was justified in inferring from the practice of the company an express authorization of the agent to extend the time of payment. There was no pretense that the agent by virtue of his power to make the contract of insurance and collect premiums could extend the time of payment. It is not uncommon, we think, for agents to keep a policy in force after a renewal premium becomes due, without actual payment by the assured. The agent sometimes credits the assured or issues a receipt to him without payment by him, the understanding being that the agent becomes personally liable to the company, and the assured to the agent. In such case as between the assured and the company the premium is regarded as paid. See *Flanders on Insurance*, page 164, and cases cited.

There is a class of cases where a receipt of premium by an agent paid when due has been held to be a waiver of a forfeiture incurred by a violation of a condition of the policy. See *Walsh v. Aetna Life Insurance Company*, 30 Iowa, 133, and cases cited. But where an agent who is authorized to receive premiums receives a premium paid when due, he is acting within the scope of his general authority. The assured has a right to suppose that the payment is valid; that it becomes a payment to the company; that the company by receiving it, if it receives it with knowledge of the forfeiture, waives the forfeiture. We have been unable to discover any rule in the law of insurance which would justify us in holding that an agent can bind the company by his consent of a postponement of a payment of a renewal premium, and keep a policy in force contrary to its provisions, unless he is expressly authorized to do so.

It has been suggested that Kennedy's authority to receive payment of premiums should be deemed to include the authority to bind the company to carry the risk without payment, because it

might be for the interest of the company to do so. But authority to an agent to do one thing does not include, by implication, an authority to do another thing merely because it might be for the interest of the principal to do the other thing. An agent has implied authority to employ the usual and necessary means to accomplish what he is expressly authorized to do. In the case at bar the carrying of the risk without payment of the premium was not necessary to enable the company to collect the premium; that was collectible without any new contract or consideration. In no view, then, did Kennedy have the implied power to make the contract relied upon.

In our opinion the rule contended for by plaintiff would have a tendency to impair the value of all insurance, both fire and life. If insurance agents can grant a valid extension of the payment of renewal premiums for a few months, as in this case, while the risk continues, they can grant such extension for a few years, or such length of time as the policy can be renewed. No company under such rule would be safe. Liabilities would constantly tend to become disproportionate to available resources. The interests bound up in insurance are too important to be thus jeopardized.

The foregoing considerations dispose of the case without regard to the fact that the loss occurred one day after the alleged extension had expired. The evidence was not such as to justify the instruction given, nor the verdict rendered.

Reversed.

BECK, J., *dissenting*. — The policy in the case insured the property for five years, the term to end November 12, 1880. The premiums were payable annually, the first being paid when the policy was issued, and the others secured by a promissory note payable in instalments of equal sums on the 12th day of November of each subsequent year. The whole of the condition of the policy touching the effect of non-payment of these instalments is not set out in the opinion of the majority of the court. The part omitted follows what is quoted in that opinion. I here present it: "When a promissory note is given by the assured for the cash premium it shall be considered a payment of such premium, provided such note is paid at or before maturity, but if such note, or any part thereof, shall remain unpaid and past due more than thirty days at the time of any loss or damage, then this company shall not be liable to pay such loss or damages happening during such default, and no attempt to collect such note or any instalment of premium upon the instalment note aforesaid, whether by legal process or otherwise, shall be deemed a waiver of any of the conditions of this policy, or have the effect to renew the policy; but upon payment by the assured of the

full amount of such note or instalment, as the case may be, and all costs that may have accrued, then this policy shall be in force as to losses happening thereafter, unless inoperative or void from some other cause."

The agent who, as plaintiff claims, extended the time of payment, was expressly empowered by the defendant *to collect* and remit the premium due upon notes of the kind given by plaintiff.

The case presents this state of facts: The policy was an existing contract at the time of the destruction of the plaintiff's property. But on account of the failure of plaintiff to pay an instalment of the note which had fallen due, the contract could not be enforced against defendant if the breach of the condition were interposed as a defense. The contract had not ceased to exist; it was binding upon the parties, and defendant would become again liable thereon upon payment of the premiums. The case does not, therefore, require us to determine whether the agent was authorized to enter into a contract of insurance. It is not claimed that his acts had that effect; nor, indeed, did the agent in the act of giving plaintiff time upon his note make any contract for the company. The whole contract between the parties is embodied in the policy. But by extending the time of payment the agent dispensed with the strict performance of the contract of the plaintiff to pay the premium on the day stipulated. The opinion of the majority of the court, I understand, concedes that if the agent did extend the time of payment, and had authority to do so, his act would operate as a dispensation of the condition of the policy and operate as a waiver of the forfeiture resulting from the non-payment. The only question, then, to be determined involves the power of the agent to make an arrangement with the plaintiff that he should have further time for the payment of the instalment then due or about to fall due.

The agent was authorized *to collect* the premiums. It cannot be doubted that if the plaintiff had paid to the agent the premium after default, the policy would have again attached. The agent could have enforced the payment under the terms of the policy. Thus far he was clothed with authority, upon the exercise of which, at his discretion, depended the binding force of the policy. His authority to collect the premium could be exercised in such a manner and at such times as the interest of the defendant determined by the agent required. Surely, the authority to collect the premium was not so limited that it could not have been exercised after default by plaintiff. It follows that the agent, before default, could arrange with the plaintiff to extend the time in the exercise of his authority to collect, or, in other words, could extend the time for payment.

It is not necessary to hold that the agent had authority to enter into a contract for the extension of the time upon the note. This would require authority to make a new contract under which the old contract would be modified. But the extension of indulgence to the plaintiff under an agreement that the insured shall not be prejudiced by delay is quite a different thing. I will illustrate this point by a supposed case. A. enters into a contract for the sale of lands to B., payment to be made upon a specified day, the time of payment being of the essence of the contract. The note given by B. to secure the purchase money is placed in the hands of C. for collection, who agrees with B. that indulgence shall be extended for a time agreed upon. In such a case the condition as to time is waived. The agent's power to collect the money was exercised in granting indulgence. I know of no reason why the same doctrine should not apply to policies of insurance. It is based upon the plainest reasons. Parties to a contract should not be enabled to lay ambuscades and pitfalls for one another; they should not, by professions of kindness and indulgence, induce the violation of the contract, and then take advantage of the default. The agent of defendant in this case was authorized to collect the premium; there was no limitation upon this authority. He, therefore, could, in the exercise of his authority, do all acts that could have been done by his principal in collecting the premium. He could grant indulgence and delay in the exercise of his authority. As I have said, the agent made no new contract; his act in granting indulgence does not demand the exercise of authority to make a new contract.

My brothers in the foregoing opinion express the thought that the agent could not grant indulgence, unless he had the authority to enter into a contract of insurance. They think that the time for the payment of premiums can only be extended by insurance agents when they deliver the policy, or do some other act required in the execution of the contract. That agents possessing such authority, and under such circumstances may waive conditions as to the time of payment, does not support the conclusion that indulgence, or, if you please, extension of time, may not be granted by an agent employed to collect premiums after the policy has attached. In my opinion the time at which an agent may perform acts under his authority, if not prescribed by the principal, rests in his discretion, to be exercised for the interest of the principal. The agent of defendant was authorized to collect the premium; he determined that he would not collect it or demand its payment until plaintiff received his pension, and so informed plaintiff, who, relying upon the arrangement, did not pay the premium before his house was

burned. As the act of the agent in extending the time of payment was done in the exercise of authority to collect the premium, the defendant is estopped to enforce the forfeiture for the non-payment of the instalment. The conclusion I reach that the payment of the instalment on the day it fell due was dispensed with, and the forfeiture waived by the act of the agent in extending the time of payment is supported by the following authorities: *Viele v. Germania Insurance Company*, 26 Iowa, 9; *Walsh v. The Etna Life Insurance Company*, 30 Id. 133; *Young & Co. v. Hartford Fire Insurance Company*, 45 Id. 377; *Insurance Company v. Norton*, 96 U. S. 234; *Mississippi Valley Life Insurance Company v. Neyland*, 9 Bush, 430; *Sheldon v. Connecticut Mutual Life Insurance Company*, 25 Conn. 207; *Bouton v. American Mutual Life Insurance Company*, 25 Conn. 542; *Trustees of Baptist Church v. Brooklyn Insurance Company*, 19 N. Y. 305; *Bowman v. Agricultural Insurance Company*, 59 N. Y. 521; *Hallock v. Commercial Insurance Company*, 2 Dutcher, 268.

In my opinion the judgment of the District Court ought to be affirmed.

2. BROKER.¹

MARSHALL, J., IN *JOHN R. DAVIS LUMBER CO. v. HARTFORD FIRE INS. CO.*

95 Wis. 226, 233. — 1897.

WHAT the powers of an insurance broker are can hardly be a subject for serious controversy. He is the agent for the assured, according to all authorities on the subject, though at the same time, for some purposes, he may be the agent for the insurer, and his acts and representations within the scope of his authority as such agent are binding upon the assured. *Mechem, Agency*, § 931; *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502; *Standard Oil Co. v. Triumph Ins. Co.*, 64 N. Y. 85; *Hamblet v. City Ins. Co.*, 36 Fed. Rep. 118; *May, Ins.*, § 124 A. Says Mr. Justice Page, in *Am. F. Ins. Co. v. Brooks*, 83 Md. 22, 34 Atl. Rep. 373: "It appears to be well settled that where one engages another to procure insurance, the person so employed is agent for the insured, and not for the insurer, in all matters connected with such procurement." Questions involving the scope of the powers of an insurance broker to represent the insured arise most frequently where notice of cancellation is served by the insurer on such broker, when the contract of insurance

¹ See also *Arff v. Ins. Co.*, *post*, p. 503.

requires it to be served upon the insured. In such cases the question turns on whether the employment of the broker extended beyond the mere procurement of the insurance. If not, it is held that his agency ceased upon the delivery and acceptance of the policy, so that service of notice of cancellation on him was ineffectual *Kehler, v. New Orleans Ins. Co.*, 23 Fed. Rep. 709; *Franklin Ins. Co. v. Sears*, 21 Fed. Rep. 290; *Body v. Hartford F. Ins. Co.*, 63 Wis. 157; *Hermann v. Niagara Ins. Co.*, 100 N. Y. 411; *Grace v. Am. Cent. Ins. Co.*, 109 U. S. 278; *Broadwater v. Lion F. Ins. Co.*, 34 Minn. 465; *White v. Conn. F. Ins. Co.*, 120 Mass. 330; *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566. But the broker may be so clothed with authority as to have full power to act for the insured in cancelling, as well as procuring, policies. *Standard Oil Co. v. Triumph Ins. Co.*, *supra*; *Hartford F. Ins. Co. v. Reynolds*, *supra*. In all cases the familiar rule respecting the relation of principal and agent applies, that, within the scope of his authority to procure insurance, he stands in the place of the principal, and the latter is bound by whatever, within such scope, such agent may do, to the same extent as if it were done by such principal.

3. ADJUSTER.

SMALDONE *v.* INS. CO. OF NORTH AMERICA.

162 N. Y. 580. — 1900.

APPEAL from a judgment of the Appellate Division of the Supreme Court, in the Third Judicial Department, entered December 10, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

CULLEN, J. — The action is brought on a standard fire insurance policy, and the only question raised on this appeal is as to the power of an agent sent by the defendant to adjust the loss to waive the provision of the policy requiring the service of proofs of loss. This agent was not only authorized to adjust the amount of the loss, but, as appears by his own testimony, was empowered to negotiate any settlement of the claim of the insured on the policy and to pay and discharge such claim. Shortly after the occurrence of the fire, and before the expiration of the time within which it was necessary to serve the proofs of loss, the agent, in his negotiations with the plaintiff's assignor and his attorney, absolutely repudiated any liability on the part of the defendant, claiming that the premises insured

were vacant in contravention of the terms of the policy, though he seems to have been willing to have settled with the insured if he could do so for a sufficiently small sum. The parties could not agree on the amount to be paid, when, as testified by the plaintiff's witnesses and as found by the jury, the agent told the attorney for the insured that he did not want him to file proofs of loss or have appraisers appointed, but that he might "go on and sue as soon as you wish to." The defendant requested the court to instruct the jury that the agent had no power to waive the requirement for service of the proofs of loss unless it was indorsed upon the policy. This request was refused and the court charged the jury that if the agent waived the service of the proofs of loss and the appointment of appraisers, his act bound the defendant.

We think that this ruling of the trial court was correct. It is not necessary to review the many cases to be found in this State on the power of agents to waive the conditions or requirements of insurance policies. There is no necessary inconsistency in the decisions of this court on the subject. The determination of the question depends on the rank and authority of the agent and the subject-matter with reference to which he assumes to act. We have recently held (*Hicks v. British Am. Ass. Co.*, 162 N. Y. 284) that a local agent authorized to issue policies could not by his declarations or acts waive the provision of a policy that proofs of loss must be furnished. The agent in this case however was not a local agent but was vested with plenary powers to adjust the defendant's liability and pay any claim that might be made against it. As to the matter in hand he was a general agent, not a special agent or one with limited authority, and could do whatever the company itself might do. It is unquestionable that he could have paid the loss without the production of any proofs of loss; equally, he could repudiate all liability on the part of the defendant and waive the proofs of loss or appointment of appraisers. The question seems settled by the late decision of this court in *Sergeant v. Liverpool & L. & G. Ins. Co.*, 155 N. Y. 349, 355, where it is said through Bartlett, J., that "While it is true that the policy in suit contained the usual clause as to proofs of loss being filed within sixty days, and that no officer, agent or other representative of the company should have power to waive any condition thereof, except by written agreement indorsed thereon, yet a party to a contract containing such a provision may, by conduct, estop himself from enforcing it against one who has acted in reliance upon such conduct. He may also be estopped by the act of an agent who possesses, or whom he has held out to possess, this power in respect to the provision." In that case

the court followed its previous decision in *Bishop v. Agr. Ins. Co.*, 130 N. Y. 488.

The judgment should be affirmed, with costs.

PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN and WERNER, JJ., concur.

Judgment affirmed.

4. SUB-AGENTS.

ARFF v. STAR FIRE INSURANCE CO.

125 N. Y. 57. — 1890.

ACTION by Daniel Arff against the Star Fire Insurance Company on a policy of insurance. A judgment for defendant, entered on the dismissal of the complaint at the trial, was affirmed on appeal to the General Term; and from the judgment of affirmance plaintiff appeals.

PECKHAM, J. — This is an action to recover upon a policy of insurance issued by the defendant upon certain personal property belonging to the plaintiff. A loss having occurred, and plaintiff having made a demand upon defendant for payment under the policy, the defendant refused to pay, because it appeared that other insurance had been taken subsequent to the issuing of the policy in question, and, as defendant claimed, no notice had been given to it of the taking of such insurance. There was a clause in the policy by which the plaintiff "agreed to notify the company if at the making of this insurance, or at any time during its continuance, there shall be any other insurance applied to the property herein described, or any part thereof, whether the same be valid or not." It was also provided that the policy should become void if the assured neglected to comply with its terms, conditions, or covenants. There was also a provision in the policy, that "only such persons as shall hold the commission of this company shall be considered as its agents in any transaction relating to this insurance or any renewal thereof, or the payment of premium to the company. Any other person shall be deemed to be the agent of the assured, and payment of the premium to such person shall be at the sole risk of the assured." The plaintiff claimed upon the trial that he had given the notice required by the company. He had in fact given it to one Werner Strecker, and whether or not that notice is sufficient is the only question in the case. The plaintiff was nonsuited on the ground that he had not given the notice as required by the policy, and that judgment of nonsuit has been affirmed by the General Term, and the plaintiff

appeals here. It appeared in evidence that McDonald & Van Alstyne were the duly commissioned agents of the company in the city of Troy at the time when this policy was issued. Mr. Van Alstyne swore that his firm had authority, as agents of the defendant, to give permits for additional insurance, and to consent to assignments for transfers of insurance. He also stated that their authority as agents of the defendant was to do a general insurance business for the company, collect premiums, give receipts and consents and indorsements on insurance policies. They had been agents of the defendant for five or six years at the time in question. When this policy was issued, and up to the time of the occurrence of the loss, this firm had been doing business in the city of Troy for the defendant as general insurance agents, and during that time Mr. Van Alstyne said that they "had in their employ, among others, this Werner Strecker," and he designated the manner of his employment as "working for us as a broker. I mean soliciting insurance on commission. He was soliciting insurance for our firm, and our firm only, on a commission. His compensation was regulated by certain commission on business he brought. He did not do other fire insurance that I know of. What he would do would be to go and solicit insurance and bring it to our office. If we approved it, we would take it and pay him his commission. That was all. He was not soliciting fire insurance for any one else. His arrangement about his working for us in the way of fire insurance was that he was employed by us to solicit insurance for our office exclusively, upon which we paid him a commission upon the business he brought in." He also said that Strecker had a desk in their office during this time. "Not one of his own, but he used one that was in the office, the same as any person. When he happened in, he came in and used a desk there the same as any broker. He had a desk that he used pretty much all the time for himself."

Mr. Strecker himself testified that he was "in the insurance business principally in 1884, — fire and life both; working for McDonald & Van Alstyne, and for no one else, not in fire insurance. I was paid according to the business I brought in. If I did a great deal of business, I got a great deal of money; and, if I didn't, I got less. During that year, I do not know whether it could be called working under a salary or not; it was always regulated by the amount of business. There was a desk in the office I usually occupied. The nature of my employment was soliciting." He solicited from Mr. Arff an application for the policy in question, and it was after the issuing of the policy that the plaintiff informed Mr. Strecker that other insurance had been taken through Mr. Fromann. It was also

stated by Mr. Van Alstyne that, under their agreement with Mr. Strecker, "he was at liberty to work for any other insurance company if he pleased. He could place his business with other insurance companies if he chose. He could place such business as he solicited, with other companies if he chose, with other agents. He had, for some considerable period anterior to 1884, acted for us in the matter of soliciting fire insurance. His office was located with us. He had a desk in our office. Prior to this he had been in our employ since 1880, doing business exclusively for our company, and having a desk in our office during that time."

There was thus evidence from which the jury could infer that Mr. Strecker was solely in the employ of these agents, and that the kind of employment in which he was engaged was the soliciting for them of policies of insurance, and for them exclusively, and that his compensation for the services performed by him for them depended upon the amount of business which he was able to do; or, in other words, the number of applications which he secured for them, and which they accepted. It is true that Mr. Van Alstyne denominated this kind of service as the service of a broker, and he also stated that Mr. Strecker was at liberty to work for any other insurance company if he pleased. If he meant that Mr. Strecker had the power to violate his agreement with them, and, instead of working exclusively for them, work for others, why that is a self-evident proposition, and has no bearing upon the question as to the capacity in which he was then employed by them. If he meant to assert that he was not exclusively employed by them, then it is a contradiction of what the witness had already several times stated to be the truth, and also a contradiction of the testimony of Mr. Strecker himself, and the fact of exclusive employment, if material, should have been left to the jury to determine. If the witness Strecker were really nothing but an ordinary insurance broker, notice to him of subsequent insurance would not be notice to the company. *Mellen v. Insurance Co.*, 17 N. Y. 609; *Devens v. Insurance Co.*, 83 N. Y. 168.

What is understood under the designation of an insurance broker is one who acts as a middleman between the insured and the company, and who solicits insurance from the public under no employment from any special company; but, having secured an order, he either places the insurance with the company selected by the insurer, or, in the absence of any selection by him, then with the company selected by such broker. Ordinarily the relation between the insured and the broker is that between the principal and his agent, and, according to Arnould on Insurance, (vol. 1, 2d ed., p. 108, c. 5), "the business of a policy broker would seem to

be limited to receiving instructions from his principal as to the nature of the risk, and the rate of premium at which he wishes to insure; communicating these facts to the underwriters; effecting the policy with them on the best possible terms for his employer; paying them the premium and receiving from them whatever may be due in case of loss." In the two cases above cited of *Mellen v. Insurance Co.* and *Devens v. Insurance Co.*, it appeared that the broker who effected the insurance in either case was not in the employment of the insuring company at all, and that the only connection between the company and him was that when he presented to them an application for insurance, if the company chose to issue a policy, he was paid a commission thereon by the company. In each of those cases the man procuring the insurance was not confined to any company in his labors. He was in no sense in the employment of any company, and the nature of his connection was such that upon receipt of the premium by the company, and the delivery of the policy to the insured, his connection with the company wholly ceased.

The connection in this case between this assumed broker and his principal is entirely different. Assuming the truth of the statement that he was in the exclusive employment of these agents, and that it was his duty in such case to bring whatever applications he received to the agents because of his agreement with them that he should work for them exclusively, it would seem that his character as an ordinary insurance broker had ceased from the time that he entered into such employment. However these agents might characterize his employment, the fact upon the testimony in the case, assuming its truth as above construed, leaves him, in my opinion, nothing more or less than a clerk or employee of these agents. He performs the same duties that would be performed by an individual employed as a clerk, and told to do this business. The mere solicitation of insurance, and the bringing of the application to these agents, who are to determine finally whether it shall or shall not be accepted, is not of such a nature that it could not be done by an ordinary clerk, nor does the doing of it in that way, and under such circumstances, necessarily preclude the person who does it from occupying the position of clerk, and place him in the position of an ordinary insurance broker. If, upon these facts, he acted as clerk, and the oral notice were given to him in his capacity of clerk of these agents, such notice would be sufficient. *McEwen v. Insurance Co.*, 5 Hill, 101, approved in *Wilson v. Insurance Co.*, 14 N. Y. 418, at 421.

It has been held that an ordinary agent of an insurance company

has the power to employ clerks to discharge the ordinary business of his agency, and that a waiver of a character which the agent himself could make is to be attributed to him when made by his clerk. In *Bodine v. Insurance Co.*, 51 N. Y. 117, it was said by Earl, C., at page 123: "We know, according to the ordinary course of business, that insurance agents frequently have clerks to assist them, and that they could not transact their business if obliged to attend to all the details in person; and these clerks can bind their principals in any of the business which they are authorized to transact. An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums, and to take payments of premiums in cash or securities, and to give credit for premiums, or to demand cash; and the act of the clerk in all such cases is the act of the agent, and binds the company just as effectually as if it were done by the agent in person. The maxim of *delegatus non potest delegare* does not apply in such a case. Story, Ag., § 14."

In the case of *Clark v. Insurance Co.*, 21 Wkly. Dig. 197, the General Term of the Supreme Court held that the policy in that suit, countersigned by a clerk in the office of the authorized and commissioned agent of the defendant, was a proper and valid policy, where the clerk was authorized by the agent to contract new insurance and to give renewals, to make monthly and daily reports, and collect premiums on policies and renewals issued. In *Chase v. Insurance Co.*, 14 Hun, 456, it was held that the knowledge of a clerk of the agents of defendant's company that the house insured was vacant was the knowledge of the agents of the company, and therefore the knowledge of the company itself. And in *Kuncy v. Insurance Co.*, 36 Hun, 66, the Supreme Court in the Fifth Department held that a general agent of a foreign insurance company had a right, by virtue of its authority, and for the purpose of discharging the duties appertaining to his office, to employ all necessary agents, clerks, and surveyors to enable him to conduct the business with correctness, intelligence, and promptness, and that, when he did in fact employ others, their acts and contracts would be binding upon the company the same as if made personally by Miller, the general agent.

Enough has been said to show that an agent of an insurance company has the right to, and indeed it is the expectation of the company that he will, employ such clerks and other assistants as may be necessary and proper in order that he may do the business for which he has been appointed agent. Soliciting insurance is part of the business of such agents, and it is not to be assumed that such solicitation can be made only by the agents personally, nor can it

be held, as matter of law, that, when it was made by some person employed exclusively by them, such solicitation on the part of the person thus employed makes him an insurance broker, and takes away from him his character as clerk or employee of the agent. The fact that Strecker was compensated for his services to these agents by a commission on the business which he brought in is not conclusive upon the question of the capacity in which he worked. Clerks or other employees are frequently compensated by a commission upon the amount of business brought to the employer by them. In order to constitute Strecker such an employee that he might receive notice for his employers as to subsequent insurance in a case like this, it is not necessary that he should have been engaged to perform only such duties as may be and are done in the office of his employer. The place of the performance of the duties is neither the sole, nor always a necessary, criterion by which to judge of the nature of such service. The employee of the agent in the case of *Bodine v. Insurance Co.*, *supra*, was not confined to the office in the performance of duties which he discharged for his employer.

There is, moreover, in the evidence of one of the agents, sufficient for a jury to infer that Strecker had a desk in their office and belonging to them, assigned to him for his personal use while at the office in the discharge of duties pertaining to his employment by them, and that it was his habit to so use the desk, which was regarded as his for such purpose. But, upon the question of the character of the service, we think it is sufficient that the person is engaged by the agent to do for him some portion of the ordinary, usual, and well-known duties pertaining to the position of the agent, and what he does in the course of that employment, and within its general scope, is done by the agent. The notice which he receives while in the performance of his duties, and which relate to the subject-matter thereof, must be regarded in the same light as and equivalent to a notice to the agent.

The proof in the case is susceptible of the inference that Strecker was employed exclusively by the agents of defendant, and to perform for them that which is part of the ordinary and usual business of an agent of an insurance company, viz., to solicit business. If the agents refused to accept the particular application, Strecker had nevertheless done all that he was employed to do by bringing it to them. By his agreement, their refusal did not authorize him to solicit some other agent or company to take the risk. At least this construction can be given to some of the evidence on the part of the plaintiff. In truth, in one view of the evidence, Strecker was not a

middleman at all. He did not act as such in this case. What he did was done by him from the very first in the interest of and for these particular agents.

Nor does the provision in the policy, that no one not holding the commission of the company shall be considered as its agent, prevent the agents' employment of the usual, and indeed necessary, clerical and other assistants, in order to enable them to properly perform their duties as commissioned agents of the company. And, when thus employed, the ordinary rules of law are applicable to their acts and positions. We think that if Strecker were exclusively employed by the agents, and that his duties could only be honestly discharged while the agreement between them lasted by giving his entire service in that line to the agents of the defendant, and if he were thus employed at the time that he procured this application and received this notice, the defendant is bound by such notice the same as if it had been given in person to their agents. If, on the contrary, according to some possible construction of the evidence of one of the agents, the employment were not exclusive, and he was occupying really the position of a simple insurance broker, then the notice was not sufficient. There were many questions put to the agent when he was on the stand, the purpose of which was to show (what may be inferred from the nature of the business) that the agents employed clerks. Counsel for the plaintiff also asked the witness whether clerks in his employ did not frequently and generally sign consents for other and additional insurance in respect to this company; whether it had been the habit of this firm of agents to attend to the details of the business, and how many clerks the firm had at this time. All these questions were objected to, and ruled out by the court below. We think they were proper for the purpose of showing the manner in which the business of this firm was conducted, although perhaps the court might assume or take judicial notice of the fact that agents of an insurance company do business largely through clerks and sub-agents, and that many of the details of their business are not performed by themselves. We should not perhaps, in this instance, reverse the judgment for the refusal to admit this evidence, but we think its admission would not have been error.

Upon the whole we think the learned judge erred in nonsuiting the plaintiff, and that the judgment entered upon the nonsuit must be reversed, and a new trial granted, with costs to abide the event. All concur, except EARL and GRAY, JJ., dissenting¹

¹ Accord as to sub agents, *Krumm v. Co.*, 40 Oh. 225.

HOOKER, J., IN GORE *v.* CANADA LIFE ASSUR. CO.

77 N. W. REP. 650 (MICH.) — 1898.

THE plaintiff brought an action against the defendant, and recovered a judgment for a balance claimed to be due him for commissions upon insurance premiums obtained from policies written for defendant's patrons upon his solicitation. The defendant has brought the case to this court by writ of error.

At the threshold of the case is the question whether the plaintiff sustained contract relations with the defendant. His claim is that he was employed on behalf of the defendant by one Glass, with the subsequent approval of Bucknell, who was called the "manager of the Michigan branch." The defendant asserts that it made a contract with some men named Cox, living in London, Ontario, by which they had control of its business in Michigan and some other States, upon a commission of fifty per cent. upon new business, they to employ and pay their own subordinates; and that they established a branch office for Michigan, which they maintained under the charge of Bucknell, who was called "manager of the Michigan branch of the Canada Life Assurance Company," who was paid by a share of the commission on Michigan business and an allowance made by the Coxes. It is claimed that Glass was engaged by them upon similar terms; that he was designated "inspector of agencies;" that he was not authorized to employ any agents for the company, but was at liberty to divide his own commissions, as he pleased, with any whom he should see fit to engage to help him * * *

The claim is made that Bucknell was held out as a general agent, and, therefore, that Gore had a right to assume that he was authorized to employ him, or ratify the act of Glass. Bucknell had charge of the Michigan branch or office for Cox, who had a contract to work the territory. The Coxes were the ones who were held out as general agents, if there were any general agents, and we do not find anything showing that Bucknell was a general agent, of the company. Gore himself testified that he did not know what his arrangement was. There is nothing to show that he was misinformed by the company, or that he even tried to ascertain. He may, perhaps, have known that the circulars of the company contained his name as manager of the Michigan branch, but that is all. We do not intend that it shall be understood that we are of the opinion that a general agency, so called, necessarily carries with it the authority to appoint special agents for the company. Manifestly, any agency, general or special, is no more than the principal

chooses to make it, unless he undertakes to limit the effect of the power which others have a right to suppose he has conferred, when he will be estopped to deny such power. We are aware that the case of *Assurance Co. v. Probst*, 18 Neb. 526, 26 N. W. 204, is authority for the proposition that, where the company conceded that one Craine was the agent for all of its business for the Northwest, the company would be bound by his employment of an agent, notwithstanding a private understanding that payment of all agents appointed was to be made by the agent. There the general authority to appoint is apparent. But here we have no employment by a general agent, nor by any one held out or advertised as such. Bucknell was advertised as manager of the Michigan branch, and neither Glass nor Bucknell, nor even the Coxes themselves, had authority to issue a policy, but merely to obtain and submit applications to the head office, as the witnesses call it, of the company. The true test, after all, is not a real or imaginary distinction between the general or special agents. It is a question whether the agent, general or special, as the case may be, has acted within the apparent scope of the authority confided. In the Nebraska case cited the holding of the court was based on the fact that the agent was authorized to transact all of the business of the company, not because he was called a general agent. The act was held to be within the general scope of his authority; and, while secret instructions might take away the power, one ignorant of them could not be permitted to suffer loss because of his ignorance of such secret instructions, having in good faith relied upon the general authority conferred. This rule is as applicable to a case where one authorizes an agent to sell a particular horse, the authority being general. The secret instructions as to price or warrant cannot bind the purchaser, as these are ordinarily within the scope of the general authority to sell the horse. *Hatch v. Taylor*, 10 N. H. 538; *Hunter v. Jameson*, 28 N. C. 252; *Bradford v. Bush*, 10 Ala. 386. There is no testimony in this case that warrants the conclusion that Bucknell had general authority to appoint agents and conduct defendant's business in Michigan. He was advertised as the manager of the branch. Apparently he had charge of the business brought to the office by the various sub-agents, and was the medium through which such business reached the company. But, unlike the Nebraska case, there is a lack of evidence to show that he had charge of all of the defendant's business in Michigan. He was manager of the Michigan branch, but that does not justify a guess by court or jury that binding the company by the appointment of agents for it was within the general scope of the authority actually

given him. In 1 Pars. Cont., p. 43, it is said: "We think the distinction between a general agency and a special agent useful, and sufficiently definite for practical purposes, although it may have been pressed too far and relied upon too much in determining the responsibility of a principal for the acts of an agent. It may, indeed, be said that every agency is, under one aspect, special, and under another, general. No agent has authority to be in all respects and for all purposes an *alter ego* of his principal, binding him by whatever the agent may do in reference to any subject whatever; and, therefore, the agency must be special so far as it is limited by place or time, or the extent or character of the work to be done. On the other hand, every agency must be so far general that it must cover not merely the precise thing to be done, but whatever usually and rationally belongs to the doing of it. Of late years, courts seem more disposed to regard this distinction, and the rules founded upon it, as altogether subordinate to that principle which may be called the foundation of the law of agency, namely, that a principal is responsible, either when he has given to an agent sufficient authority, or when he justifies a party dealing with his agent in believing that he has given to this agent this authority." We cannot say that this evidence tends to prove that the appointment of agents usually and rationally belongs to the doing of the business confided to Bucknell, and we certainly cannot say it as a matter of law.

5. ORAL WAIVER.

LAMBERTON v. CONNECTICUT FIRE INSURANCE CO.

39 MINN. 129. — 1888.

DICKINSON, J. — The plaintiff recovered a verdict in this action upon a contract of fire insurance. This is an appeal from an order refusing a new trial. The construction and effect of the following provisions of the policy are to be considered: "If the premises hereby insured are or shall hereafter become vacated or unoccupied, and so remain for more than ten days, * * * without notice to the company in each case, and consent indorsed hereon, * * * this policy shall be void. * * * This policy may be cancelled at any time at the request of the assured, the company retaining customary monthly short rates for the time the policy has been in force. It may also be cancelled at any time by the company, upon giving written or verbal notice to that effect, and refunding or tendering to the assured * * * a ratable proportion of the premium

for the unexpired term of the policy. * * * *Limitations to Suits.*
* * * And it is further expressly covenanted by the parties hereto that no officer, agent, or representative of this company shall be held to have waived any of the terms and conditions of this policy, unless such waiver shall be indorsed hereon in writing." Some months prior to the destruction of the premises by fire they became, and thereafter remained, vacant; the assured in the meantime endeavoring to secure a suitable tenant. The local agent of the defendant at Winona, where the property was situated, who had issued this policy, knew that the house was vacant during all of this time, and in negotiations with the assured upon this subject he treated the policy as still continuing in force; so that, if the defendant was bound by his acts in this particular, it would be estopped to claim that its liability had terminated. He did not, however, notify the company of the fact, nor was there any written consent that the policy should remain in force.

The question is thus presented whether the conduct of the agent affected and bound the company. The position taken on the part of the company is that the power of the agent to bind the principal in this particular was, by the clause found at the close of the foregoing extract from the policy, so restricted that he could only do this by a written consent indorsed on the policy; and that, the assured being thus advised of the restrictions upon the power of the agent, the action of the latter was ineffectual to bind the company.

It is an important consideration that this policy does not impose any restriction upon the power of any particular agent, or class of agents; nor does it limit the power of some agents by conferring authority exclusively upon others; nor does it prescribe the manner in which alone a particular agent or class of agents shall exercise their authority. We do not, therefore, express any opinion concerning the effect of such stipulations. The restriction here is so broad that it applies alike to every "officer, agent, or representative of this company;" and, as a corporation can only act through such agencies, the substance of the provision under consideration is that the company shall not be held to have waived any of the terms or conditions of the policy, unless its waiver be expressed by a written indorsement on the policy. That is to say, in other words, that one of the parties to a written contract, which is not required by law to be in writing, cannot, subsequent to the making of the contract, waive, by parol agreement, provisions which have been incorporated in the contract for his benefit. A contracting party cannot so tie his own hands, so restrict his own legal capacity for future action, that he has not the power, even with the assent of the other

party, to bind or obligate himself by his further action or agreement contrary to the terms of the written contract. *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143. This is self-evident. The clause of this policy relied upon, as expressly restricting the power of the agent whose conduct is here in question, is of that character. If it is effectual at all as a limitation of the power of future action, it limits the power of every agent, officer, and representative of the company, and hence, practically, that of the corporation. It is no more applicable to this particular agent than to all of those to whom the conduct of the affairs of the corporation is committed. In that broad scope, and as applicable to all the representatives of the corporation, it cannot be enforced so as to render inoperative such subsequent action or agreement of corporate agents as would, if it were not for this clause in the contract, be deemed the effectual action or agreement of the corporation. A more restricted application of this clause, making it to refer to this particular agent, or to any particular class of agents or officers, cannot be made; nor can the clause in the former part of the above extract from the policy, as to the effect of vacancy "without notice to the company and consent indorsed hereon," be construed as a limitation upon the power of any particular agent or class of agents. If it applies to any agent or officer, it does to all; and if such a stipulation is not effectual to limit the legal capacity of the corporation as to its future action, it does not limit its capacity to act by its agents. The company, then, was legally capable, acting through its proper agents, of waiving its right to treat the policy as of no further binding force by reason of the vacancy; and it could also waive compliance with that part of the same provision which related to the consent being indorsed on the policy. Confessedly, the agent whose conduct is in question had authority to give such consent by indorsing the same upon the policy. When, in negotiating upon this subject with the assured, he did consent, as is established by the verdict of the jury, he was acting as the agent of the company. His action was the action of the company; and, the assured having been led to understand, as the agent seems to have done, that the contract should remain in force until further action should be taken, the company is now estopped, as by its own conduct, to claim the contrary. This conclusion finds sufficient support in the following decisions, and in others, although we are aware that there are decisions to the contrary. *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *Young v. Hartford Fire Ins. Co.*, 45 Iowa, 377; *American Cent. Ins. Co. v. McCrea*, 8 Lea, 513; *Von Bories v. United, etc., Ins. Co.*, 8 Bush, 133; *Maryland Fire Ins. Co.*

v. Gusdorf, 43 Md. 506; *Insurance Co. v. Norton*, 96 U. S. 234; *Stolle v. Etna F. & M. Ins. Co.*, 10 W. Va. 546; *Carrugi v. Atlantic Fire Ins. Co.*, 40 Ga. 135; *Wakefield v. Orient Ins. Co.*, 50 Wis. 532, 7 N. W. Rep. 647; *Whited v. Germania Fire Ins. Co.*, 76 N. Y. 415; *Morrison v. Insurance Co. of North America*, 69 Tex. 353, 6 S. W. Rep. 605.

Order affirmed.

WILKINS *v.* STATE INSURANCE CO.

43 MINN. 177. — 1890.

MITCHELL, J. — The defendant, an Iowa corporation, but doing business in this State, had an agent at Faribault, whose general duties were to solicit insurance, fill up the blanks in printed policies already signed by the general officers of the company, and left in his possession, countersign and deliver the same, and collect and remit the premiums. It is undisputed in the evidence that this agent, having solicited the plaintiff for insurance on his stock, and the plaintiff being unable then to pay the premium, assumed to waive immediate payment, and to give plaintiff a temporary credit for the premium, and delivered to him the policy on which this action is brought. The agent subsequently called on the plaintiff at least twice for the premium, but the latter failed to pay; and some two and one-half months after the policy was issued the property was burned, the premium being still unpaid.

The question is whether the company was bound by the act of the agent in waiving immediate payment of the premium, and giving plaintiff credit. The policy contains a provision that "no insurance shall be considered as binding until actual payment of the premium." The same rules apply to insurance companies as to any other case of agency. They are bound by all the acts of their agents within the scope of the real or apparent authority with which they have clothed them, and no farther; and it would seem well settled by the great weight of authority that, at least in the case of stock companies, a person dealing with an agent possessing the powers exercised by this agent has a right to assume, in the absence of notice to the contrary, that he has authority, pending negotiations for a contract of insurance, to waive a provision like the one quoted, and to give a short credit for the premium. But it is the undoubted right of the company, as in the case of any principal, to impose a limitation upon the authority of its agents. And it is as elementary as it is reasonable that if an agent exceeds his actual authority, and the person dealing with him has notice of that fact, the principal is not bound; and it is upon this proposition that defendant chiefly

relies. There are two provisions in the policy to which he refers in support of his contention. The first is that "no officer, agent, or representative of the company shall be held to have waived any of the terms or conditions of this policy unless such waiver shall be indorsed thereon." Following *Lamberton v. Conn. Fire Ins. Co.*, 39 Minn. 129, 39 N. W. Rep. 76, which is abundantly supported by the authorities, this contains no limitation upon the authority of any class of agents, prohibiting them from waiving any of the terms or conditions of the policy. It applies alike to all representatives of the company, executive or general officers as well as others; and, so far as it assumes to be a limitation at all, it is upon the company itself, to the effect that it can only waive the conditions of the policy in a certain way, or, rather, it assumes to provide what shall be the exclusive evidence of such waiver. This provision, therefore, will not support defendant's contention, but the other or second one does. It is as follows: "This policy is made and accepted upon the above express terms, and no part of this contract can be waived except in writing signed by the secretary of the company." The words "policy" and "contract" are evidently here used as synonymous, and the latter clause clearly means that none of the terms of the policy can be waived by any one except the secretary. Conceding that this would not prevent the company itself, through its board of directors, or other body representing it in its corporate capacity, from waiving any of the terms or conditions of the policy, yet it is a plain declaration that no representative of the company but the secretary can do so, and hence that no local agent can do it. This, being in the policy itself, was notice to plaintiff that this agent at Faribault had no authority to waive the condition that no insurance would be binding until payment of the premium. It is no answer to say that he did not read the policy, and hence did not know what it contained. He was bound to know this; and, by accepting the policy, he is estopped from setting up powers in the agent in opposition to the express limitations contained in it. For this reason, we think the court erred in charging the jury that, if the policy was delivered by the agent to the plaintiff with the intention of giving him a temporary credit for the premium, this would be a delivery that would bind the company so that the policy would be operative and in force.

Order reversed.¹

¹ "The contention is that, under one clause of the policy quoted above, there could be no such waiver by any officer or agent of the company, because no such 'waiver or extension in express terms and in writing, signed by the presi-

b. Agent of the Insured or Insurer?

KAUSAL v. MINNESOTA FARMERS' MUTUAL FIRE
INS. CO.

31 MINN. 17. — 1883.

THE plaintiffs brought this action in the District Court for Hennepin County to recover upon a policy of insurance against fire, issued to them jointly by the defendant, upon a certain house and furniture in which they allege that they had an insurable interest, and which were subsequently destroyed by fire. The answer of the defendant admits the issuance of a joint policy to the plaintiffs, alleges that the same was issued in reliance upon plaintiffs' application for membership in defendant and for the insurance mentioned,

dent or secretary of the company,' as therein provided, was ever made. The court instructed the jury, in effect, that the local agent had no such authority, and that any action by him in that regard, without the knowledge or approval of somebody higher in authority, would be ineffectual as against it. This is within the ruling in *Hankins v. Rockford Ins. Co.*, 70 Wis. 1. But the clause of the policy referred to is claimed to be broad enough to include the general agent, and in fact every officer and agent of the company, except the president and secretary, — and even them, unless the act be in express terms and in writing, signed by one of them. We must hold, however, that such attempted restrictions upon the power of the company or its general officers or agents, acting within the scope of their general authority, to subsequently modify the contract and bind the company in a manner contrary to such previous conditions in the policy, are ineffectual. Especially is this true in respect to a foreign insurance company, whose officers are practically inaccessible to the assured. These views are in harmony with the repeated rulings of this court. *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 108; *Am. Ins. Co. v. Gallatin*, 48 Wis. 36; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361. The same principle has been sanctioned in well-considered opinions of other courts. *Lamberton v. Connecticut F. Ins. Co.*, (Minn.) 39 N. W. Rep. 76; *Willcuts v. Northwestern M. L. Ins. Co.*, 81 Ind. 308; *Steen v. Niagara F. Ins. Co.*, 89 N. Y. 326; *Richmond v. Niagara F. Ins. Co.*, 79 N. Y. 230; *Eastern R. Co. v. Relief F. Ins. Co.*, 105 Mass. 570; *American L. Ins. Co. v. Green*, 57 Ga. 469; *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143." — *Renier v. Ins. Co.*, 74 Wis. 89, 97 (1889).

In *Marvin v. Co.*, 85 N. Y. 278, 282 (1881), the court says: "The policy contained an express provision that any alteration or waiver of its conditions, 'unless made at the head office, and signed by an officer of said company, shall not be considered as valid.' Granting, therefore, that Henkle was shown to be a general agent of this company; granting also what was not proved, but perhaps may be inferred from the character of his office, (*Carroll v. Charter Oak Ins. Co.*, 1 Abb. Ct. App. 318; *Sheldon v. The Atlantic Fire and Marine Ins. Co.*, 26 N. Y. 465.) that he had authority, unless restricted, to waive conditions; the difficulty remains that he was in that respect restricted, and his authority limited and curtailed, by an express provision in the policy itself, thus brought to the knowledge of the assured, and, therefore, had no power, in and of himself, to waive the condition of payment, or agree that it should be waived."

and upon the statements and answers contained in such application, which the plaintiffs agreed should be warranties on their part; that "in and by said policy it is provided that any misrepresentation by the assured of the value, condition, situation, title or occupancy of the property, or any omission to make known every fact material to the risk, or any misrepresentation whatever, or fraud, or attempt at fraud, whether in written application or otherwise, or fraud, or false swearing in proofs of loss, shall cause a forfeiture of all claims under the policy," and "that if the interest of the assured, whether as owner, or trustee, factor, agent, or mortgagee, lessee or otherwise, be not truly stated, then the policy shall be null and void."

ORAL WAIVER IN NEW YORK UNDER STANDARD FIRE POLICY. In *Moore v. Ins. Co.*, 141 N. Y. 216, 223 (1894), the court says: "The sole question is the construction of the standard policy issued under the requirements of chapter 488, Laws of 1886. The precise point involved in this case has been before this court frequently since the enactment of the law of 1886. The use of the standard policy was compelled by legislative enactment to remedy existing evils, and, among others, to protect insurance companies from the perils of alleged parol waivers by their local agents. Every person who now enters into a contract of insurance is required to agree that no officer or agent or other representative of the company shall have power to waive any provision or condition of the policy, except such as by the terms thereof may be subject of agreement indorsed thereon, and as to such provisions and conditions the waiver must be written upon or attached to the policy, and he specially covenants that he will not claim any privilege or permission unless it be in writing. The judgment appealed from ignores the plain provisions of the contract of the parties relating to foreclosure and waiver, and is contrary to the decisions of this court on the precise point presented now, and others which involve the same principle of construction. In *Quinlan v. Providence Washington Ins. Co.*, 133 N. Y. 356, the necessity of notice in case of foreclosure was considered. Judge Andrews, in discussing the question of alleged waiver, said (p. 363): 'It is to be assumed that Kelsey' (the agent of the company) 'learned of the commencement of the foreclosure proceedings, and thereupon assured the plaintiff that his rights under the policy would not be prejudiced thereby.' Again, at page 366, after holding that the principle that courts lean against forfeitures is unimpaired, says: 'But where the restrictions upon the agent's authority appear in the policy, and there is no evidence tending to show that his powers have been enlarged, there seems to be no good reason why the authority expressed should not be regarded as the measure of his power; nor is there any reason why courts should refuse to enforce forfeitures plainly incurred, which have not been expressly or impliedly waived by the company.' The following cases are also in harmony with these views, viz.: *Armstrong v. Agri. Ins. Co.*, 130 N. Y. 560; *Baumgartel v. Prov. W. Ins. Co.*, 136 Id. 547; *Allen v. German Am. Ins. Co.*, 123 Id. 6; *Messelback v. Norman*, 122 Id. 583; *O'Brien v. Prescott Ins. Co.*, 134 Id. 28; *Lett v. Guardian Fire Ins. Co.*, 125 Id. 82." In *Sergeant v. Ins. Co.*, 155 N. Y. 349, 355 (1898) the court says: "This is an action upon the usual standard policy of fire insurance. * * * While it is true that the policy

The answer further alleges that in their application the plaintiffs stated that they were the owners of the property described in the application, and that such statement was false; that in such application the plaintiffs stated that there was no incumbrance upon any of the property described, and that such statement was false, specifying certain incumbrances; that in such application the plaintiffs stated that the dwelling-house described was completed and painted, and that it was used and occupied as a dwelling-house solely, and that such statements were false. The answer also contains allegations of false swearing in the proofs of loss, of negligence of plaintiffs causing the fire, and of the amount recoverable under the policy, and denies the alleged value of the property destroyed.

in suit contained the usual clause as to proofs of loss being filed within sixty days, and that no officer, agent or other representative of the company should have power to waive any condition thereof, except by written agreement indorsed thereon, yet, a party to a contract containing such a provision may, by conduct, estop himself from enforcing it against one who has acted in reliance upon such conduct. He may also be estopped by the act of an agent who possesses, or whom he has held out to possess this power in respect to the provision. *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 433."

ORAL WAIVER IN MASSACHUSETTS UNDER THE STANDARD FIRE POLICY. — In *Parker v. Ins. Co.*, 162 Mass. 479, an agent of an insurance company, to whom the company had intrusted blank policies of the Massachusetts standard form, signed by the president and secretary, with authority to countersign and issue such policies, "and by writing indorsed thereon to renew any such policies, or to vary the risk therein," and providing that all his powers are to be exercised subject to the rules and regulations of the company, "and, when provision is made therefor in such policy in the manner provided therein," was held to have no authority to give an oral assent to the removal of property insured; the policy containing a condition requiring the written or printed assent of the company to such removal. The court said: "It might, however, be suggested that the agents orally agreed to give a written assent in the future to the removal of the property, and that such oral agreement is binding upon the defendant. This position, if tenable, would to a great extent do away with the protection and safeguards which the requirement of a writing was designed to secure. There is nothing to show that the agents had authority to enter into such oral agreement in behalf of the company, though perhaps they might themselves be bound thereby. It might further be suggested that the agents could by indirection evade the provision requiring a written assent to the removal; that is, that they might consent to a cancellation of the policy, and then agree orally to issue a new policy to the plaintiffs upon their property in the place to which it had been removed. Whether the agents had power in any case to bind the defendant by an oral agreement to issue a policy, we need not inquire; but if they had, it does not follow that they could also bind the defendant by an oral assent to the removal of the property. If direct authority to do a certain thing is denied, it is not to be inferred or implied because by possibility substantially the same result may be reached by indirection."

The reply alleges that the plaintiffs "are foreigners, and ignorant of the English language, and did not know what was contained in the application for insurance mentioned in said answer; that the same was made out by an agent of the defendant, and plaintiffs signed the same by his direction, without knowing the contents of the same; that the said Julia Kausal was, at the time of such insurance, the owner of an undivided three-quarters of the land upon which the dwelling-house stood, and in possession of all said land, and the said plaintiff, William Kausal, was the owner of all of said dwelling-house; that all of such ownership was told to said agent of the defendant at the time of such insurance, and the defendant had at such time due notice of the same." The reply admits "that said house was not painted," but alleges that "the same was completed," and "that, at the time the said application was made, an agent of the defendant, duly authorized to solicit insurance and to take and receive applications therefor on the part of the defendant, was present at the said house so insured, and examined the same, and fully knew all the circumstances of its condition, and solicited said insurance, and wrote out said application as aforesaid, and told the plaintiffs the same was correct, and induced them to sign the same." The reply denies all other allegations than those above admitted.

On the trial before Young, J., and a jury the defendant objected to the reception of any evidence on the part of the plaintiffs, on the ground that it is incompetent, irrelevant and immaterial under the pleadings, which objection was sustained. The plaintiffs then offered to prove all the allegations of the reply, which offer was rejected, upon defendant's objection, and, on defendant's motion, the action was dismissed. Plaintiffs appeal from an order refusing a new trial.

MITCHELL, J. — 1. On principle, as well as for considerations of public policy, agents of insurance companies authorized to procure applications for insurance, and to forward them to the companies for acceptance, must be deemed the agents of the insurers and not of the insured in all that they do in preparing the application, or in any representations they may make to the insured as to the character or effect of the statements therein contained. This rule is rendered necessary by the manner in which business is now usually done by the insurers. They supply these agents with printed blanks, stimulate them by the promise of liberal commissions, and then send them abroad in the community to solicit insurance. The companies employ them for that purpose, and the public regard them as the agents of the companies in the matter of preparing and filling

up the applications — a fact which the companies perfectly understand. The parties who are induced by these agents to make applications for insurance rarely know anything about the general officers of the company, or its constitution and by-laws, but look to the agent as its full and complete representative in all that is said or done in regard to the application. And in view of the apparent authority with which the companies clothe these solicitors, they have a perfect right to consider them such. Hence, where an agent to procure and forward applications for insurance, either by his direction or direct act, makes out an application incorrectly, notwithstanding all the facts are correctly stated to him by the applicant, the error is chargeable to the insurer and not to the insured. *Insurance Co. v. Mahone*, 21 Wall. 152; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Malleable Iron Works v. Phenix Ins. Co.*, 25 Conn. 465; *Hough v. Insurance Co.*, 29 Conn. 10; *Woodbury Sav. Bank v. Charter Oak Fire & Marine Ins. Co.*, 31 Conn. 517; *Miner v. Insurance Co.*, 27 Wis. 693; *Winans v. Insurance Co.*, 38 Wis. 342; *Roxley v. Insurance Co.*, 36 N. Y. 550; *Brandup v. Insurance Co.*, 27 Minn. 393, 7 N. W. 735; 2 Am. Lead. Cas. (5th ed.) 917 *et seq.*; *Wood, Ins.*, c. 12; *May, ins.*, § 120.¹

2. After the courts had generally established this doctrine, many of the insurance companies, in order to obviate it, adopted the ingenious device of inserting a provision in the policy that the application, by whomsoever made, whether by the agent of the company or any other person, shall be deemed the act of the insured and not of the insurer. But, as has been well remarked by another court, "there is no magic in mere words to change the real into the unreal. A device of words cannot be imposed upon a court in place of an actuality of fact." If corporations are astute in contriving such provisions, courts will take care that they shall not be used as instruments of fraud or injustice. It would be a stretch of legal princi-

¹ "The forms and requirements of different insurers are different, and when an agent, who at the time and place is the sole representative of the principal, assumes to know what information the principal requires, and after being furnished with all the facts, drafts a paper which he declares satisfactory, induces the other party to sign it, receives and retains the premium moneys, and then delivers a contract which the other party is led to believe, and has a right to believe, gives him the indemnity for which he paid his money, we do not think the insurer can be heard in repudiation of the indemnity on the ground of his agent's unskillfulness, carelessness or fraud. If this can be done it is easy to see that community is at the mercy of these insurance agents, who will have little difficulty in a large proportion of the cases, in giving a worthless policy for the money they receive." — *Etna Live Stock, etc., Ins. Co. v. Olmstead*, 21 Mich. 246, 252.

ples to hold that a person dealing with an agent, apparently clothed with authority to act for his principal in the matter in hand, could be affected by notice, given after the negotiations were completed, that the party with whom he had dealt should be deemed transformed from the agent of one party into the agent of the other. To be efficacious, such notice should be given before the negotiations are completed. The application precedes the policy, and the insured cannot be presumed to know that any such provision will be inserted in the latter. To hold that by a stipulation, unknown to the insured at the time he made the application, and when he relied upon the fact that the agent was acting for the company, he could be held responsible for the mistakes of such agent, would be to impose burdens upon the insured which he never anticipated. Hence we think that if the agent was the agent of the company in the matter of making out and receiving the application, he cannot be converted into the agent of the insured by merely calling him such in the policy subsequently issued. Neither can any mere form of words wipe out the fact that the insured truthfully informed the insurer, through its agent, of all matters pertaining to the application at the time it was made.¹ We are aware that in so holding we are placing ourselves in conflict with the views of some eminent courts. But the conclusion we have reached is not without authority to sustain it, and is, as we believe, sound in principle, and in accordance with public policy. *Woods, Ins.*, § 139; *May, Ins.*, § 140; *Insurance Co. v. Ives*, 56 Ill. 402; *Gans v. Insurance Co.*, 43 Wis. 108; *Insurance Co. v. Cooper*, 50 Pa. St. 331.

3. It is contended by respondent that there is a distinction in this

¹ "And it is a part of this contract that any person other than the assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever, or in any transaction relating to this insurance." Whatever may be the true construction of the stipulation last above quoted, it certainly does not, and in the nature of things cannot, substitute the plaintiff as the principal of Latimer & Co. in respect to the contract of insurance, in the place of the company. The contract was made, and the defendant was undoubtedly bound by it, from the moment the policy was delivered to the plaintiff; and if the stipulation substitutes the plaintiff for the company as the principal of Latimer & Co., then it is competent for a person to make a contract with his own agent which shall bind a third party who is a stranger to it, and who never agreed to be bound by it. This would be a manifest absurdity. As to the clause that a waiver of any condition of the policy to be binding, must be indorsed upon it, it is only necessary to say it is now settled that this requirement may be waived by parol or by acts *in pais*." — *Gans v. Ins. Co.*, 43 Wis. 108, 112.

regard between "stock" and "mutual" insurance companies; that the difference in the character of the companies makes a difference in the relative duties of the applicant and the company, and the authority of the agents employed; that in the case of a mutual company the application is in effect not merely for insurance, but for admission to membership — the applicant himself becoming a member of the company upon the issue of the policy. By some courts a distinction in this respect is made between the two classes of companies. This distinction is usually based upon the ground that the stipulations held binding upon the insured are contained in the charter or by-laws of the company, and that a person applying for membership is conclusively bound by the terms of such charter and by-laws. Such is not this case, for the stipulations claimed to bind the insured are only in the policy. But, so far as concerns the questions now under consideration, we fail to see any distinction between the two kinds of companies, and we feel confident that the average applicant for insurance is rarely aware of any. It is true that in the case of a mutual company the insured becomes in theory a member of the company upon the issue of the policy. But in applying and contracting for insurance the applicant and the company are as much two distinct persons as in the case of a stock company, and we see no reason for holding the agent who takes the application any less the agent of the insurer in the one case than in the other. The membership does not begin until the policy is issued. As to all previous negotiations the agent acts only for the company. *Insurance Co. v. Cooper, supra*; May, Ins., § 139 *et seq.*

4. Verbal testimony is competent to show that the application was filled up by the agent of the company, and that the facts were fully and correctly stated to him, but that he, without the knowledge of the insured, misstated them in the application. This was not in violation of the rule that verbal testimony is not admissible to vary a written contract. It proceeds upon the ground that the contents of the paper was not his statement, though signed by him, and that the insurance company, by the acts of their agent in the matter, are estopped to set up that it is the representation of the insured. *Insurance Co. v. Wilkinson, supra*; May, Ins., § 143, and cases cited, note 3. * * *

Order reversed.

FOLGER, J., IN WHITED v. GERMANIA FIRE INSURANCE CO.

76 N. Y. 415, 418. — 1879.

The defense against the action is: That the policy contained certain conditions, and that they were broken by the plaintiff: First, that if the property insured should be sold, the policy should become void; and that it was sold. Second, that if the interest of the assured in the property is not truly stated in it, it should become void; and that the interest of the plaintiff in the property became that of a mortgagee, and was not so stated in the policy, nor in the renewal certificates. Third, that anything less than a distinct, specific agreement, clearly expressed, and indorsed on the policy, should not be construed as a waiver of any condition therein.

Those conditions do appear in the policy, and it is true that the relation of the plaintiff did change, as is alleged, and that the change is not noted in, or indorsed in writing on, the policy, or either of the certificates.

But the plaintiff puts in the way of that defense that the defendant waived those conditions.

Upon the facts in the case, as settled by the verdict, there was a parol waiver of the conditions rested upon by the defendant and a parol consent to keep on foot the insurance of the plaintiff in his new *status* of mortgagee; if Harmon was the agent of the defendant in the dealing for the last renewal, and not the agent of the plaintiff. *Fish v. Cottenet*, 44 N. Y. 538; *Shearman v. Niagara Fire Ins. Co.*, 46 Id. 526; *Pechner v. Phoenix Ins. Co.*, 65 Id. 195; *Van Schoick v. Niagara Fire Ins. Co.*, 68 Id. 434; *Bidwell v. No. West Ins. Co.*, 24 Id. 302. That he was the agent of the defendant it would be fatuous to deny, were it not for a clause in the policy, upon which the defendant builds. That clause is in this wise: That any person other than the assured, who may have procured the insurance to be taken, shall be deemed to be the agent of the assured, and not of the company, under any circumstances whatever, or in any transaction relating to this insurance. That clause we have held to be forceful in *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, and *Alexander v. Same Defendant*, 66 Id. 464. We have not held it so as yet, further than the scope of the facts in those cases. The case in 66 New York hangs upon that in 62 New York. In the latter case, it was held that as the insured had contracted that the person who procured the insurance should be deemed his agent, he must abide by his agreement; and that though, through fault or mistake, that person had, in the application for a policy, misstated to the com-

pany the declarations of the assured, whereby there had been wrought an untrue representation, yet that as he had been agreed upon as the agent of the insured, the insured must suffer for the error or the wrong. That case dealt with matters before the issuing of the policy. It is so, that the clause in the policy is broad, and takes into the fold of its wording any circumstances whatever, and any transaction relating to the insurance. In its verbal scope it has to do with acts as well after as before and at the time of the giving out of the policy. But if the insured is to be now bound as having thus contracted, there must be mutuality in the contract. No man can serve two masters. If the procurer of the insurance is to be deemed the agent of the insured, and Harmon is to be deemed such procurer, he may not be taken into the service of the insurer as its agent also; or if he is so taken, the insurer must be bound by his acts and words, when he stands in its place and moves and speaks as one having authority from it; and *pro hac vice*, at least, he does then rightfully put off his agency for the insured, and put on that for the insurer. Hence it was that in *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 128, we held that the same clause in the policy there put out by that defendant did not make the insured the principal. In that policy the insurer had, besides the clause just named, put the condition hostile to it that the application must be made out by an authorized agent of the insurer; and we held that the latter swallowed down the former. In the case in hand the defendant has declared, over the hands of its president and secretary, that a renewal certificate from it will not be valid unless countersigned by the duly authorized agent of the company at Oswego, New York. It had before sent two such certificates to Harmon, which he had countersigned as such agent, and delivered to the plaintiff. The plaintiff had paid to him the premiums for those renewals, and he had sent them to the defendant. The defendant treated these two certificates as valid, because countersigned by Harmon. Thereby it asserted that Harmon was its duly authorized agent. It held him up to the plaintiff as such. It knew, then, that those certificates had been put out and taken as valid; and it must have known that it was so, because Harmon thought, and the plaintiff thought, and that both had reason from the conduct of the defendant to think, that Harmon was the duly authorized agent of the defendant. It is too late, after letting those two go out as valid and the third like certificate has been issued and premium paid, for it to say that Harmon is not the agent of the defendant therein, and that he is the agent of the plaintiff. The defendant must have some living, sentient touch of those doing business with it, and when it reposes

confidence in the actor therein and gives him discretionary power to bind and loose, it is idle to say that he is not its agent thereto. The law is too severe to brook such an absurdity. Nor will it hold the plaintiff so strictly to the contract he made as to permit the defendant to ignore it and take his agent as its agent, and yet make him suffer for all the shortcomings of that person while acting between them, and while under authority from the defendant to act for it. Should it be granted that Harmon was the agent of the plaintiff, even then comes this rule, that one employing the agent of another cannot take advantage from the acts and omissions of that agent to the harm of his principal. It is a rule that if one principal to a contract deal surreptitiously with the agent of the other principal, it is a fraud upon the other principal. The defrauded one, if he comes in time, is entitled at his option to have the contract rescinded; or if he elects not to have it rescinded, to have such other adequate relief as the court may think right to give him. *P. & S. P. Tel. Co. v. Ind. Rub., Gut. Perch. and Tel. W. Co.*, 10 Chy. App. Cas. 526. The principle should be applied in the case in hand to the aid of Whited.

The case, then, is that of the holder of a policy asking for a renewal of it, and making known to the agent of the insurer the facts which have made, or will make, a breach of some of the conditions in it, and thereupon receiving from that agent a written renewal certificate, after payment and receipt of the premium, and having from him a promise that he would "make it all right." The powers of the agent were such as that the transaction with him was the same as if done with the defendant; it is bound as fully as if it were so. There was thus a perfect waiver of those conditions of the policy, and it remained a valid contract for another term. When the loss insured against happened, the defendant became liable to pay, and has shown no real defense against the action.¹

¹ Upon provisions of the character in question there is now a diversity of opinion in the intermediate appellate courts in New York. The provision is held effective in *Bernard v. Ins. Co.*, 14 App. D. 142, (First Department, 1897) and in *Sternaman v. Ins. Co.*, 49 App. D. 473, (Fourth Department, 1900); and ineffective in *O'Farrell v. Ins. Co.*, 22 App. D. 495, (Second Department, 1897).

The Court of Appeals has held the provision effective where the agent was an insurance broker. *Allen v. Ins. Co.*, 123 N. Y. 6.

NEW YORK LIFE INSURANCE CO. *v.* FLETCHER.

117 U. S. 519. — 1886.

THE New York Life Insurance Company, on the 22d of December, 1877, issued at its home office in the city of New York to Chionda S. Alford a policy of insurance upon his life for the sum of \$10,000. The assured was a resident of Missouri, and in December, 1877, he applied to an agent of the company there for such a policy, and submitted to an examination. He also made certain statements and representations respecting himself, his life, and his past and present health, to which he appended a declaration, warranting their truthfulness and agreeing that they should be the basis of any contract between him and the company, and that if they, or any of them, were in any respect untrue, the policy which might be issued thereon should be void, and that all moneys paid on account of that insurance should be forfeited; and further agreeing, that, inasmuch as only the officers at the home office had authority to determine whether or not a policy should issue on any application, and as they acted only on the written statements and representations referred to, no statements or representations made or information given to the persons soliciting or taking the application for the policy, should be binding on the company or in any manner affect its rights, unless they were reduced to writing and presented at the home office in the application. To the policy was annexed a copy of the application, and upon it was endorsed the following notice in red type and conspicuously printed:

“For the information of the assured, and in order that any unintentional errors or omissions which hereafter may be found to exist may be corrected, an abstract of the application upon which this policy is based may be found in the third page within. If corrections are desired, when satisfactory to the company, a certificate to that effect will be issued over the signature of the president and actuary.”

Payment of the insurance money was refused on the alleged ground of false statements and representations in the application. Thereupon the executor brought this action in a court of Missouri, and upon the petition of the company it was removed to the Circuit Court of the United States. The plaintiff obtained a verdict for the full amount of the insurance money with interest, upon which judgment was rendered.

MR. JUSTICE FIELD. — It is conceded that the statements and representations contained in the answers, as written, of the assured to the questions propounded to him in his application, respecting

his past and present health, were material to the risk to be assumed by the company, and that the insurance was made upon the faith of them, and upon his agreement accompanying them that, if they were false in any respect, the policy to be issued upon them should be void. It is sought to meet and overcome the force of this conceded fact by proof that he never made the statements and representations to which his name is signed; that he truthfully answered those questions; that false answers written by an agent of the company were inserted in place of those actually given, and were forwarded with the application to the home office; and it is contended that, such proof being made, the plaintiff is not estopped from recovering. But on the assumption that the fact as to the answers was as stated, and that no further obligation rested upon the assured in connection with the policy, it is not easy to perceive how the company can be precluded from setting up their falsity, or how any rights upon the policy ever accrued to him. It is, of course, not necessary to argue that the agent had no authority from the company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the company were deceived by the fraudulent conduct of the agent. The assured was placed in the position of making false representations in order to secure a valuable contract which, upon a truthful report of his condition, could not have been obtained. By them the company was imposed upon and induced to enter into the contract. In such a case, assuming that both parties acted in good faith, justice would require that the contract be cancelled and the premiums returned. As the present action is not for such a cancellation, the only recovery which the plaintiff could properly have upon the facts he asserts, taken in connection with the limitation upon the powers of the agent, is for the amount of the premiums paid, and to that only would he be entitled by virtue of the statute of Missouri.

But the case as presented by the record is by no means as favorable to him as we have assumed. It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which dis-

tinguishes them in this particular from others. But here the right is asserted to prove not only that the assured did not make the statements contained in his answers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application, he would have seen that it stipulated that the rights of the company could in no respect be affected by his verbal statements, or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed. [*Here follows a statement of Insurance Co. v. Wolff*, 95 U. S. 326;¹ *Insurance Co. v. Norton*, 96 U. S. 240; and *Loehner v. Ins. Co.* 17 Mo. 247.]

The present case is very different from *Insurance Co. v. Wilkinson*, 13 Wall. 222,² and from *Insurance Co. v. Mahone*, 21 Wall. 152. In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. Reference was made to the interested and officious zeal of insurance agents to procure contracts, and to the fact that parties who were induced to take out policies rarely knew anything concerning the company or its officers, but relied upon the agent who had persuaded them to effect insurance, "as the full and complete representative of the company in all that is said or done in making the contract," and the court held that the powers of the agent are *prima facie* coextensive with the business entrusted to his care, and would not be narrowed by limitations not communicated to the person with whom he dealt. Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, though nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is, therefore, bound by its statements. [*Here follows a statement of Ryan v. Ins. Co.* 41 Conn. 168]

¹ Reported herein at p. 482

² Reported herein at p. 423

The instruction given to the jury in the case before us is, in effect, that the assured was bound by his application if it was not avoided for fraud, and that it was so avoided by reason of the false statements contained in it, and that, therefore, the plaintiff, as his representative, could recover. But if the application was avoided, it would seem to be a necessary consequence that the policy itself was also avoided, and his right limited to recovering the premiums paid. But such was not the conclusion of the court. It directed the jury that if the application was avoided for fraud, he could recover. It does not seem to have occurred to the court that had the answers been truthfully reported, and the fact of the assured having had diabetes within a recent period been thus disclosed, the insurance would in all probability have been refused. If the policy can stand with the application avoided, it must stand upon parol statements not communicated to the company. This, of course, cannot be seriously maintained in the face of its notice that only statements in writing forwarded to its officers would be considered. A curious result is the outcome of the instruction. If the agents committed no fraud the plaintiff cannot recover, for the answers reported are not true; but if they did commit the imputed fraud he may recover, although, upon the answers actually given, if truly reported, no policy would have issued. Such anomalous conclusions cannot be maintained.

There is another view of this case equally fatal to a recovery. Assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated, not only upon himself but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statements. The consequences of that approval cannot after his death be avoided. The court charged the jury that if the assured had discovered the fraud before the policy was delivered and the first premium paid, it would have been his duty to decline to go any further with the transaction; but if he did not discover the fraud until after such delivery and payment, he was not called upon to take any steps for the cancellation of the contract. In other words, the jury were told that the assured might take to himself the benefit of the fraud without responsibility for it, if he did not discover it until after it was consummated — a doctrine without authority and

wholly indefensible. No one can claim the benefit of an executory contract fraudulently obtained, after the discovery of the fraud, without approving and sanctioning it. [*Here follows a statement of Amer. Ins. Co. v. Neiberger*, 74 Mo. 167 and *Richardson v. Ins. Co.* 46 Me. 394.]

Reversed, and the cause remanded for a new trial.

STATUTORY ENACTMENTS DECLARING CERTAIN PERSONS TO BE AGENTS OF THE INSURANCE COMPANY. — Some States have legislative acts of the general character of the following Wisconsin statute (Rev. St. Wis., 1898, § 1977): “Whoever solicits insurance on behalf of any insurance corporation or person desiring insurance of any kind, or transmits an application for or a policy of insurance, other than for himself, to or from any such corporation, or who makes any contract for insurance, or collects any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business of like nature for any insurance corporation, or advertises to do any such thing, shall be held to be an agent of such corporation, to all intents and purposes, unless it can be shown that he receives no compensation for such services.” Of this act, the court says, in *United Firemen's Ins. Co. v. Thomas*, 92 Fed. 127, 133: “Under this statute it is held that the rule was changed which required the insured at his peril to know whether the person with whom he is dealing had the power he assumed to exercise, or whether he was acting within the scope of his authority, and that one who procures policies from an authorized agent, delivers them, and collects and shares in the premium, is the agent of the company, *Schomer v. Insurance Co.*, 50 Wis. 575, 7 N. W. 544; *Knox v. Insurance Co.*, 50 Wis. 671, 7 N. W. 776; and that one who applies for insurance, and delivers a policy in a company not represented by him, but by other agents, is its agent, *Alkan v. Insurance Co.*, 53 Wis. 136, 10 N. W. 91; *Body v. Insurance Co.*, 63 Wis. 157, 23 N. W. 132. But it is also held that the statute does not change the rule respecting the relations of principal and agent, and cannot be construed to prevent an insurance broker employed to procure insurance from another from being the agent of the assured at the same time in procuring the policy; and the same rule applies as in other agencies, — that the principal is bound by the acts and representations of the agent within the scope of his authority. *John R. Davis Lumber Co. v. Hartford Fire Ins. Co.*, 95 Wis. 226, 70 N. W. 84. The true meaning of the statute is well expressed in *Hankins v. Insurance Co.*, 70 Wis. 1, 35 N. W. 34: That the word

"agent" is limited to the act of the particular person doing one or more of the things specifically designated; in other words, whenever an insurance company authorizes any person to do any one of the things thus specified, it cannot disclaim the agency of such person in the doing of anything necessarily implied in the specific act thus authorized, and that the word "agent," as used in these statutes, means as expressly stated in the Illinois statute, an authorized agent of the company. In *Wood v. Insurance Co.*, 126 Mass. 316, it is said of a similar statute that the statute relating to agents of insurance companies does not change the relation of the common law regulating the power of agents to bind their principals, and that the statute cannot be construed so as to prevent the person who is agent for the insurer for some purpose by virtue of the statute, from being the agent of the insured for other purposes, and that he may well be the agent for each in matters which do not conflict."

c. Duty to Principal.

AMERICAN STEAM-BOILER INS. CO. v. ANDERSON AND OTHERS.

130 N. Y. 134. — 1891.

CROSS-APPEALS from Superior Court of New York city, General Term.

Action by the American Steam Boiler Insurance Company against Edward C. Anderson and George S. Stanton for damages for procuring the cancellation of policies of insurance. From a judgment affirming a judgment entered on a verdict for plaintiff, both parties appeal. Affirmed.

In June, 1884, by an instrument executed by the parties, the plaintiff appointed the defendants as its managers and general agents for the States of New York, New Jersey, and Connecticut, with some local exceptions. The defendants were empowered to issue policies, and as commissions to have thirty per cent. of the premiums received; either of the parties to terminate the agency at pleasure on ninety days' notice. In December, 1885, a further arrangement was made to the effect that the agreement creating such relation should cease and determine on January 1, 1886, "and from that date be null and void," saving any claim the plaintiff should then have against the defendants for unpaid accounts. As such agents the defendants, in December, 1884, made two policies to R. Hoe & Co., insuring them to the amount of \$50,000 and

\$25,000, = \$75,000, for three years, upon buildings, engines, boilers, etc., against damages by explosion, for which a premium of \$1,125 was paid, of which the defendants retained \$337.50 for their commissions. Provision was made in the policies for their cancellation at any time at the request of the assured, and that in such event the plaintiff should retain the charges for inspection and the customary short rates for the term the policies had been in force. These policies were, at the request of the assured, canceled in March, 1887, and \$118.13 of the premium were returned by the plaintiff, as required by the contract of insurance. The cancellation by R. Hoe & Co. was induced and procured by the solicitation of the defendants, who had then become the agents of the Hartford Steam-Boiler Insurance Company, and induced and procured that firm to take, in place thereof, insurance in the last named company, in consequence of which the plaintiff was required to refund such portion of the premium. The purpose of this action was to recover damages of the defendants for thus causing the cancellation of the policies and the refunding of the amount repaid, for thirty per cent. of which, with interest, a verdict was directed for the plaintiff.

BRADLEY, J. — There was upon the evidence no controversy of fact, but the questions presented had relation to the legal consequences, as between the parties, of the action of the defendants in inducing and procuring the assured to surrender the plaintiff's policies of insurance, and to demand a rebate of the premium paid to it. The motive of the defendants for doing this does not appear, further than may be implied from the fact that the defendants also induced R. Hoe & Co., the assured, to take in lieu thereof insurance in the Hartford Steam-Boiler Insurance Company, which the defendants then represented. Their relation of agency to the plaintiff had terminated by the terms of their contract with it in that respect, and they had rightfully become the agents of the rival company in the business of like insurance. Their relation with the latter company required the defendants to subserve its interest faithfully and diligently, and consistently with that relation it was in the line of their duty to induce R. Hoe & Co. to take insurance in the company the defendants then represented. But the question is whether any consideration was due from them for the contracts they had, as agents for the plaintiff, made while they held that relation to it. They had, pursuant to such agency, and for it, insured the property of Hoe & Co.; and that was done under a contract by which they were entitled to and did receive thirty per centum of the premiums paid. This was compensation for their skill and services as agents of the plaintiff. Although their fiduciary relation to the plaintiff

had terminated, the contract of insurance they in that character had made with the assured remained only partially executed, — the time of its indemnity had not expired, — and as a consequence the premiums paid were not fully earned. The defendants had, pursuant to their contract of agency with the plaintiff, received thirty cents of every dollar of those premiums. They received this from the plaintiff in consideration of the services by them performed in its business and behalf by virtue of the contract between them. The policies of insurance were made subject to the right reserved to the assured of surrendering them, and having a rebate and reimbursement *pro tanto* of the premiums paid; and this without prejudice to the defendants, since they had duly performed the services of creating the relation of insurer and assured. This is all they undertook to do for their stipulated compensation.

But, when they had accomplished this, were they at liberty to defeat the purpose or duration of the contract of insurance, and retain the fruits of it, to the prejudice of the plaintiff? It quite clearly seems that they could not do so without failure to observe their obligation arising out of the contractual relation which they had assumed with the plaintiff, and pursuant to which they made for it the contract of insurance. When their agency for the plaintiff terminated, the unearned portion of the premium upon the Hoe & Co. policies existed in the contract executory in character, and of which the defendants had received thirty per centum by virtue of their contract with the plaintiff. There is no well-supported principle which would enable them to take from the plaintiff the benefit of the contract of insurance it had through them made, and retain the portion of the consideration received by them, and which they had caused the plaintiff to restore to the assured. The question was not one of disability arising out of fiduciary relation; that had ceased to exist between the parties. It was one founded in contract, pursuant to which the defendants had received compensation out of the proceeds of the transaction measured by the term of indemnity; and by causing the defeat of the operation of the contract of insurance they had created, before its stipulated period expired, and thus requiring the plaintiff to rebate a portion of the premium, they caused a partial failure of consideration of the contract they assumed to perform, and, to the extent at least of the amount received by them of the sum which the plaintiff was thus required to refund, they became liable to reimburse it. The power of an agent to create rights by contract for his principal includes an implied duty to observe, and not to defeat or destroy, them. The facts in the present case did not necessarily require the conclusion

of bad faith, on the part of the defendants, although it may have been permitted; nor was the action tried by the court upon the theory that they were chargeable with that imputation; and for that reason, if for no other, there was no error or prejudice in the exclusion of certain evidence offered by the defendants. And the question was finally treated by the parties at the trial as one of law only. In that view the measure of damages, as founded upon the contract between the parties, by which the defendants' agency was created and pursuant to which they issued the policies, was that which the court adopted in the direction of the verdict; and that amount the plaintiff was entitled to recover. In legal contemplation the relief of the plaintiff from its contract of insurance was of some value to it at the time the policies were canceled, although it turned out that no loss would have been suffered if they had continued effectual until the end of the term for which they were issued.

The judgment should be affirmed without costs in this court to either party. All concur. Judgment affirmed.¹

¹ "In an action against an insurance company to recover unearned premiums by the assignee of claims for such unearned premiums on policies issued by the defendant, a plea alleging that the policies on which the unearned premiums are claimed were procured by plaintiff as defendant's agent, for the procurement of which plaintiff received a portion of the premiums paid by the policy-holders, that plaintiff, after ceasing to be defendant's agent, induced the said policy-holders to cancel the policies for the purpose of depriving the defendant of the benefits thereof, and then bought the unearned premiums in violation of defendant's rights, avers no facts which constitute a defense to the action, or precludes a recovery by the plaintiff, and a demurrer thereto is properly sustained; the policy-holders having the absolute right to cancel their policies, and to be immediately refunded their unearned premiums, had, therefore, the right to assign their claims to such premiums, which gave the assignee the legal right to sue thereon." — *Scottish Union, etc., Ins. Co. v. Dangaix*, 103 Ala. 388 (Syllabus).

PART IX.

SUBROGATION.

a. Fire Insurance.

1. IN GENERAL.

CASTELLAIN v. PRESTON AND OTHERS.¹

11 Q. B. D. 380. — 1883.

APPEAL to the plaintiff from the judgment of Chitty, J., in favor of the defendants. The facts are fully stated in the report of the proceedings before Chitty, J., 8 Q. B. D. 613, and it is necessary here only to briefly recapitulate them.

The plaintiff sued on behalf of the London, Liverpool and Globe Insurance Company to recover a sum of £330, with interest since the 25th of September, 1878. On the 25th of March, 1878, the defendants, as owners of certain lands and buildings in Liverpool, effected an insurance on the buildings against loss by fire, and they kept the policy on foot by payment of the premiums until after the fire hereinafter mentioned occurred. The policy was in the usual form, giving the insurers the option of reinstating the property. On the 31st of July, 1878, the defendants contracted to sell the land and the buildings to their tenants, Messrs. Rayner, for the sum of £3100, and they received a deposit. The contract provided that the time of the completion should be such day within two years from the date as the vendors should name. On the 15th of August in the same year a fire occurred damaging part of the buildings. A claim was made on behalf of the defendants, and after negotiation as to the sum to be paid, the amount of the claim was ultimately fixed at £330, and that sum was in fact paid on the 25th of September, 1878, by the insurers, who were at the time ignorant of the existence of the contract for sale. On the 25th of March, 1879, the defendants

¹ This case arose out of the determination of *Rayner v. Preston*, 18 Ch. D. 1 reported herein at p. 344.

named the 5th of May as the day of completion, and on the following 12th of December the conveyance was executed and the balance of the purchase money paid.

BRETT, L. J. — In this case the action is brought by the plaintiff, as representing an insurance company, against the defendants, in respect of money which has been paid by that company to the defendants on account of the loss by fire of a building. The defendants were the owners of property consisting partly, at all events, of a house, and the defendants had made a contract of sale of that property with third persons, which contract, upon the giving of a certain notice as to the time of payment, would oblige those third persons, if they fulfilled the contract, to pay the agreed price for the sale of that property, a part of which was a house, and, according to the peculiarity of such a sale and purchase of land or real property, the vendees would have to pay the purchase money, whether the house was, before the date of payment, burnt down or not. After the contract was made with the third persons, and before the day of payment, the house was burnt down. The vendors, the defendants, having insured the house in the ordinary form with the plaintiff's company, it is not suggested that upon the house being burnt down the defendants had not an insurable interest. They had an insurable interest, as it seems to me, first, because they were at all events the legal owners of the property; and, secondly, because the vendees or third persons might not carry out the contract, and if for any reason they should never carry out the contract, then the vendors, if the house was burnt down, would suffer the loss. Upon the happening of the fire, the defendants made a claim on the insurance company represented by the plaintiff, and were paid a certain sum which represented the damage done to the house. After that, the contract of sale between the defendants and the third persons, the vendees of the property, was carried out, and the full amount of the purchase money was paid by the third persons to the defendants notwithstanding the fire. Under those circumstances the plaintiff representing the insurance company brings this action; I do not say that he brings it to recover back the money which has been paid by the insurance company (for that expression of opinion would rather interfere with the form of the action), but he brings the action in respect of that money.

The question is whether this action is maintainable. The case was tried before Chitty, J., and he, in a very careful and elaborate judgment (8 Q. B. Div. 613, at page 615), has come to the conclusion that the insurance company cannot recover against the defendants in respect of the money paid by them. It seems to me that

the foundation of his judgment is this, that he considers that the doctrine of subrogation of the insurer into the position of the assured is confined within limits, which prevent it from extending to the present case. I must now consider whether I can agree with him.

In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law, is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.

In the course of this discussion many propositions and rules well known in insurance law have been glanced at. For instance, to speak of marine insurance, the doctrine of a constructive total loss originated solely to carry out the fundamental rule which I have mentioned. It was a doctrine introduced for the benefit of the assured; for, as a matter of business, a constructive total loss is equivalent to an actual total loss; and if a constructive total loss could not be treated as an actual total loss, the assured would not recover a full indemnity. But grafted upon the doctrine of constructive total loss came the doctrine of abandonment, which is a doctrine in favor of the insurer or underwriter, in order that the assured may not recover more than a full indemnity. The doctrine of constructive total loss and the doctrine of notice of abandonment engrafted upon it were invented or promulgated for the purpose of making a policy of marine insurance a contract of indemnity in the fullest sense of the term. I may point out that the doctrine of notice of abandonment is most difficult to justify upon principle; it was introduced, rather as a matter of justice in favor of the underwriters, so as to prevent the assured from obtaining by fraud more than a full indemnity. That doctrine is to a certain extent technical, that is to say, although the assured has in reality suffered a constructive total loss, and although he is upon general principles entitled to recover, nevertheless he must fail unless he has given a notice of abandonment. I suppose that the doctrine of notice of abandonment

was originally introduced by merchants and underwriters, and afterwards adopted as part of the law as to marine insurance; but at first sight it seems a mere encroachment of the judges.

I have mentioned the doctrine of notice of abandonment for the purpose of coming to the doctrine of subrogation. That doctrine does not arise upon any of the terms of the contract of insurance; it is only another proposition which has been adopted for the purpose of carrying out the fundamental rule which I have mentioned, and it is a doctrine in favor of the underwriters or insurers in order to prevent the assured from recovering more than a full indemnity; it has been adopted solely for that reason. It is not, to my mind, a doctrine applied to insurance law on the ground that underwriters are sureties. Underwriters are not always sureties. They have rights which sometimes are similar to the rights of sureties, but that again is in order to prevent the assured from recovering from them more than a full indemnity. But it being admitted that the doctrine of subrogation is to be applied merely for the purpose of preventing the assured from obtaining more than a full indemnity, the question is, whether that doctrine, as applied in insurance law, can be in any way limited. Is it to be limited to this, that the underwriter is subrogated into the place of the assured so far as to enable the underwriter to enforce a contract, or to enforce a right of action? Why is it to be limited to that, if when it is limited to that, it will, in certain cases, enable the assured to recover more than a full indemnity? The moment it can be shown that such a limitation of the doctrine would have that effect, then, as I said before, in my opinion, it is contrary to the foundation of the law as to insurance, and must be wrong. And, with the greatest deference to my Brother Chitty, it seems to me that that is the fault of his judgment. He has by his judgment limited this doctrine of subrogation to placing the insurer in the position of the assured only for the purpose of enforcing a right of action, to which the assured may be entitled. In order to apply the doctrine of subrogation, it seems to me that the full and absolute meaning of the word must be used, that is to say, the insurer must be placed in the position of the assured. Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavor to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of

condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished. That seems to me to put this doctrine of subrogation in the largest possible form, and if in that form, large as it is, it is short of fulfilling that which is the fundamental condition, I must have omitted to state something which ought to have been stated. But it will be observed that I use the words "of every right of the assured." I think that the rule does require that limit. In *Burnand v. Rodocanachi*, 7 App. Cas. 333, the foundation of the judgment to my mind was, that what was paid by the United States government could not be considered as salvage, but must be deemed to have been only a gift. It was only a gift to which the assured had no right at any time until it was placed in their hands. I am aware that with regard to the case of reprisals, or that which a person whose vessel had been captured got from the English government by a way of reprisal, the sum received has been stated to be, and perhaps in one sense was, a gift of his own government to himself, but it was always deemed to be capable of being brought within the range of the law as to insurance, because the English government invariably made the "gift," so invariably, that as a matter of business it has come to be considered as a matter of right. This enlargement, or this explanation, of what I consider to be the real meaning of the doctrine of subrogation, shows that in my opinion it goes much further than a mere transfer of those rights which may at any time give a cause of action either in contract or in tort, because if upon the happening of the loss there is contract between the assured and a third person, and if that contract is immediately fulfilled by the third person, then there is no right of action of any kind into which the insurer can be subrogated. The right of action is gone; the contract is fulfilled. In like manner if upon the happening of a tort the tort is immediately made good by the tortfeasor, then the right of action is gone; there is no right of action existing into which the insurer can be subrogated. It will be said that there did for a moment exist a right of action in favor of the assured, into which the insurer could have been subrogated. But he cannot be subrogated into a right of action until he has paid the sum insured and made good the loss. Therefore innumerable cases would be taken out of the doctrine, if it were to be confined to existing rights of action. And I go further and hold that if a right of action in the assured has been satisfied, and the loss has been thereby diminished,

then, although there never was nor could be any right of action into which the insurer could be subrogated, it would be contrary to the doctrine of subrogation to say that the loss is not to be diminished as between the assured and the insurer by reason of the satisfaction of that right. I fail to see at present if the present defendants would have had a right of action at any time against the purchasers, upon which they could enforce a contract of sale of their property whether the building was standing or not, why the insurance company should not have been subrogated into that right of action. But I am not prepared to say that they could be, more particularly as I understand my learned brother, who knows much more of the law as to specific performance than I do, is at all events not satisfied that they could. I pass by the question without solving it, because there was a right in the defendants to have the contract of sale fulfilled by the purchasers notwithstanding the loss, and it was fulfilled. The assured have had the advantage therefore of that right, and by that right, not by a gift which the purchasers could have declined to make, the assured have recovered, notwithstanding the loss, from the purchasers, the very sum of money which they were to obtain whether this building was burnt or not. In that sense I cannot conceive that a right, by virtue of which the assured has his loss diminished, is not a right which, as has been said, affects the loss. This right which was at one time merely in contract, but which was afterwards fulfilled, either when it was in contract only, or after it was fulfilled, does not affect the loss; that is to say, it affects the loss by enabling the assured, the vendors, to get the same money which they would have got if the loss had not happened.

While I am applying the doctrine of subrogation which I have endeavored to enunciate, I think it due to Chitty, J., to point out what passages in his judgment require some modification. 8 Q. B. Div., at page 617. I find him reading this passage: "I know of no foundation for the right of underwriters, except the well known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss." That is a quotation from Lord Cairns in *Simpson v. Thomson*, 3 App. Cas. 279, at page 284. The learned judge then goes on, "What is the principle of subrogation? On payment the insurers are entitled to enforce all the remedies, whether in contract or in tort, which the insured has against third parties, whereby the insured can compel such third parties to make good the loss insured against." That is, as it seems to me, to confine this doctrine of

subrogation to the principle that the insurers are entitled to enforce all remedies, whether in contract or in tort. I should venture to add this — "And if the assured enforces or receives the advantage of such remedies, the insurers are entitled to receive from the assured the advantage of such remedies." Then when we come to this illustration, "Where the landlord insures, and he has a covenant by the tenant to repair, the insurance office, on payment in like manner, succeeds to the right of the landlord against his tenant." I would add this — "And if the tenant does repair, the insurer has the right to receive from the assured a benefit equivalent to the benefit which the assured has received from such repair." Then, dealing with the case of *Burnand v. Rodocanachi*, 7 App. Cas. 333, the learned judge cites the opinion of Bramwell, L. J., 8 Q. B. Div. at page 618. He says that Bramwell, L. J., in his judgment held that it was not salvage, but "that in the circumstances the sum received by the shipowner was but a pure gift, and there was no right on the part of the insurers to recover any part of it over against him." I, for myself, venture to add this as the reason, "Because there was no right in the assured to demand the compensation from the American government." There was no right to demand it, it was bestowed and received as a pure gift. *Darrell v. Tibbitts*, 5 Q. B. Div. 560, seems to me to be entirely in favor of the plaintiff in this case. I shall not retract from the very terms which I used in that case. It seems to me that in *Darrell v. Tibbitts*, 5 Q. B. Div. 560, the insurers were not subrogated to a right of action or to a remedy. They were not subrogated to a right to enforce the remedy, but what they were subrogated into was the right to receive the advantage of the remedy which had been applied, whether it had been enforced or voluntarily administered by the person who was bound to administer it. That seems to me to be the doctrine. Then with regard to the passage (5 Q. B. Div. at page 563), "the doctrine is well established, that where something is insured against loss, either in a marine or a fire policy, after the assured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-matter insured." I wish to explain that that was a distinct clause, and it was so intended by me when I stated it. I then mentioned contracts: "And with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safety of the subject-matter insured by reason of the peril insured against." I fail to conceive any contract which gives a right over the thing insured, which is not affected by the loss or

safety of it; and if it is necessary to bring the present case within those terms, it seems to me that the contract of purchase and sale was affected by that loss. I will not go further with the judgment of Chitty, J., except to say this, that at the end my learned brother has put it thus, that "the only principle applicable is that of subrogation as understood in the full sense of that term." 8 Q. B. Div. at page 625. There I agree with him, only my view of the full sense is larger than that which he adopted. "And that where the right claimed is under a contract between the insured and third parties, it must be confined to the case of a contract relating to the subject matter of the insurance, which entitled the insurers to have the damages made good." I think it would be better expressed in this way — "which entitles the assured to be put by such third parties into as good a position as if the damage insured against had not happened." If it is put in that sense, it seems to me to be consistent with the proposition which I laid down at the beginning of what I have said, and to cover this case. I will repeat it, "which entitles the assured to be put by such third parties into as good a position as if the damage insured against had not happened." The contract in the present case, as it seems to me, does enable the assured to be put by the third party into as good a position as if the fire had not happened, and that result arises from this contract alone. Therefore, according to the true principles of insurance law, and in order to carry out the fundamental doctrine, namely, that the assured can recover a full indemnity, but shall never recover more, except, perhaps, in the case of the suing and laboring clause under certain circumstances, it is necessary that the plaintiff in this case should succeed. The case of *Darrell v. Tibbitts*, 5 Q. B. Div. 560, has cut away every technicality which would prevent a sound decision. The doctrine of subrogation must be carried out to the full extent, and carried out in this case by enabling the plaintiff to recover.

COTTON, L. J. — In this case the appellant's company insured a house belonging to the defendants, and before there was any loss by fire the defendants sold the house to certain purchasers. Afterwards there was a fire, and an agreed sum was paid by the insurance office to the defendants in respect of the loss. The appellant apparently seeks to recover the sum which the office paid to the defendants, and if the plaintiff's claim could be shaped only in this form, I think my opinion would be against him. The plaintiff's claim may be treated in substance in another way, namely, the company seek to obtain the benefit either wholly or partly of the amount paid by them out of the purchase-money which the defendants have

received since the fire from the purchasers. In my opinion, the plaintiff is right in that contention. I think that the question turns on the consideration of what a policy of insurance against fire is, and on that the right of the plaintiff depends. The policy is really a contract to indemnify the person insured for the loss which he has sustained in consequence of the peril insured against, which has happened, and from that it follows, of course, that as it is only a contract of indemnity, it is only to pay that loss which the assured may have sustained by reason of the fire which has occurred. In order to ascertain what that loss is, everything must be taken into account which is received by and comes to the hand of the assured, and which diminishes that loss. It is only the amount of the loss, when it is considered as a contract of indemnity, which is to be paid after taking into account and estimating those benefits or sums of money which the assured may have received in diminution of the loss. If the proposition is stated in that manner, it is clear that the office would be entitled to the benefit of anything received by the assured before the time when the policy is paid, and it is established by the case of *Darrell v. Tibbitts*, 5 Q. B. Div. 560, that the insurance company is entitled to that benefit, whether or not before they pay the money they insist upon a calculation being made of what can be recovered in diminution of the loss by the assured; if they do not insist upon that calculation being made, and if it afterwards turns out that in consequence of something which ought to have been taken into account in estimating the loss, a sum of money, or even a benefit, not being a sum of money, is received, then the office, notwithstanding the payment made, is entitled to say that the assured is to hold that for its benefit, and although it was not taken into account in ascertaining the sum which was paid, yet when it has been received it must be brought into account, and if it is not a sum of money, but a benefit that has been received, its value must be estimated in money.

Now Lord Blackburn, in the case of *Burnand v. Rodocanachi*, 7 App. Cas. 333, at page 339, states the principle in these words: "The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity), and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be

recouped by having that amount back." In *Darrell v. Tibbitts*, 5 Q. B. Div. 560, to which I have already referred, the question which we had to consider was whether the insurance office was entitled to the benefit produced in consequence of a covenant to repair if the building should be damaged by an explosion of gas. In my opinion it was not intended in any way to limit the right of the insurer, as an insurer, to cases where the contract in respect of which benefit has been received related to the same loss or damage as that against which the contract of indemnity was created by the policy. That was what was before this court in that case, and undoubtedly expressions do occur as to a contract relating to the loss or affecting the loss, but the principle was not limited to contracts. The principle which I have enunciated goes further, and if there is a money or any other benefit received which ought to be taken into account in diminishing the loss, or in ascertaining what the real loss is against which the contract of indemnity is given, the indemnifier ought to be allowed to take advantage of it in order to calculate what the real loss is, even although the benefit is not a contract or right of suit which arises and has its birth from the accident insured against. Of course the difficulty is to consider what ought to be taken into account in estimating that loss against which the insurer has agreed to indemnify, and we have been pressed in argument with many difficulties. One which possibly was put to us most strongly, was that the contract of sale has nothing to do with destruction by fire, and if any part of the purchase-money is to be taken into account, why is a gift not to be taken into account? That may be said to diminish the loss as well as a contract of sale. The answer is that when a gift is made afterwards in order to diminish the loss, it is bestowed in such terms as to show an intention to benefit the assured, and to give the insurer the benefit of that would be to divert the gift from its intended object to a different person. That really was what was decided in *Burnand v. Rodocanachi*, 7 App. Cas. 333. There the money bestowed, not as a matter of right but as a gift, was intended to benefit the assured beyond the amount which they had got in consequence of any insurance. There is another ground which may possibly exclude gifts. It may be that the right of the insurer to have a sum brought into account in diminution of the loss, against which he has given a contract of indemnity, is confined to that which is a right or other incident belonging to the person insured, as an incident of the property at the time when the loss takes place. This definition would not include a sum subsequently bestowed on the assured by way of gift, for it can in no way be said to have been appertaining to him as

owner of the property at the time when the loss took place. But, in the present case, what we have to consider is whether the contract of sale is not an incident of the property belonging to the owners at the time of the loss in such a way, that it ought to be brought into account in estimating the loss, against which the insurer has undertaken to indemnify. What was the position of the parties? The defendants' house was insured, and there was a loss from fire, the damage caused by the fire being estimated by the parties at £330. Ultimately, the property having been already agreed to be sold at a fixed price, the assured received the whole amount of that price. Now they did that in respect of a contract relating to the subject insured, the house, and, to my mind, if they received the whole amount of the price which they previously had fixed as the value of the house, that must of necessity be brought into account when it was received, for the purpose of ascertaining what was the ultimate loss against which they had concluded a contract of indemnity with the insurance office. Here the purchasers have paid the money in full, and as the property was valued between the vendors and the purchasers at £3100, the vendors got that sum in respect of that which had been burned, but which had not been burned at the time when the contract was entered into. They had fixed that to be the value, and then any money which they get from the purchasers, and which together with £330, the sum paid by the office, exceeds the value of the property as fixed by them under the contract to sell, must diminish, and in fact entirely extinguishes the loss occasioned to the vendors of the property by the fire. Therefore, though it cannot, to my mind, be said that the insurers are entitled, because the purchase is completed, to get back the money which they have paid, yet they are entitled to take into account the money subsequently received under a contract for the sale of the property existing at the time of the loss, in order to see what the ultimate loss was against which they gave their contract of indemnity. On the principle of *Darrell v. Tibbitts*, 5 Q. B. Div. 560, when the benefit afterwards accrued by the completion of the purchase, the insurance company were entitled to demand that the money paid by them should be brought into account. Therefore the conclusion at which I have arrived is, that if the purchase-money has been paid in full, the insurance office will get back that which they have paid, on the ground that the subsequent payment of the price which had been before agreed upon, and the contract for payment of which was existing at the time, must be brought into account by the assured, because it diminishes the loss against which the insurance office merely undertook to indemnify them. In my opinion, there-

fore, the decision below was erroneous. I think Chitty, J., based it upon this, that in this case there was no right of subrogation, no contract which the office could have insisted upon enforcing for their benefit. I think it immaterial to decide that question, because the vendors have exercised their right to insist upon the completion of the purchase.

BOWEN, L.J. — I am of the same opinion. [*Then follows a consideration of the nature of fire insurance as a contract of indemnity.*]

Chitty, J., goes on to discuss the case on the basis of what he calls the principle of subrogation. I will add very little to what Brett, L. J., has said about that. It seems to me that a good deal of confusion would be caused, if one were to suppose that insurers are in the position of sureties. A surety is a person who answers for the default of another, and an insurer is a person who guarantees against loss by an event. The default or nondefault of another, as between that other and the person who is insured, may diminish or increase the loss; but what the insurer is guaranteeing is not the default of that person, he is guaranteeing that no loss shall happen by the event. And subrogation is itself only the particular application of the principle of indemnity to a special subject-matter, and there I think is where the learned judge has gone wrong. He has taken the term "subrogation," and has applied it as if it were a hard and fast line, instead of seeing that it is part of the law of indemnity. If there are means of diminishing the loss, the insurer may pursue them, whether he is asking for contracts to be carried out in the name of the assured, or whether he is suing for tort. It is said that the law only gives the underwriters the right to stand in the assured's shoes as to rights which arise out of, or in consequence of, the loss. I venture to think there is absolutely no authority for that proposition. The true test is, can the right to be insisted on be deemed to be one the enforcement of which will diminish the loss? In this case the right, whatever it be, has been actually enforced, and all that we have to consider is whether the fruit of that right after it is enforced does not belong to the insurers. It is insisted that only those payments are to be taken into consideration which have been made in respect of the loss. I ask why, and where is the authority? If the payment diminishes the loss, to my mind it falls within the application of the law of indemnity. On this point I should like to pause one instant to consider the definition which Brett, L. J., has given. It does seem to me, that taking his language in the widest sense, it substantially expresses what I should wish to express with only one small appendage that I desire to make. I wish to prevent the danger of his definition being sup-

posed to be exhaustive by saying that if anything else occurs outside it the general law of indemnity must be looked at.

With regard to gifts, all that is to be considered is, has there been a loss, and what is the loss, and has that loss been in substance reduced by anything that has happened? Now I admit that in the vast majority of cases it is difficult to conceive a voluntary gift which does reduce the loss. I do not think that the question of gift was the root of the decision in *Burnand v. Rodocanachi*, 7 App. Cas. 333, although it seems to me that it was a very essential matter in considering the case. I think the root of the decision in *Burnand v. Rodocanachi*, was that the payment which had been made did not reduce the loss, not having been intended to do so. The truth was that the English government and the American government agreed that the sums which were to be paid were to be paid, not in respect of the loss, but in respect of something else, and therefore the payment could not be a reduction of the loss. Suppose that a man who has insured his house has it damaged by fire, and suppose that his brother offers to give him a sum of money to assist him. The effect on the position of the underwriters will depend on the real character of the transaction. Did the brother mean to give the money for the benefit of the insurers as well as for the benefit of the assured? If he did, the insurers, it seems to me, are entitled to the benefit, but if he did not, but only gave it for the benefit of the assured, and not for the benefit of the underwriters, then the gift was not given to reduce the loss, and it falls within *Burnand v. Rodocanachi*, 7 App. Cas. 333. If it was given to reduce the loss, and for the benefit of the insurers as well as the assured, the case would fall on the other side of the line, and be within *Randal v. Cockran*, 1 Ves. Sr. 98, to which allusion has been made. In the present case the vendors have been paid the whole of their purchase-money. Even if they had not been paid, but had still the purchase-money outstanding, they would have had some beneficial interest in the nature of their vendor's lien. An unpaid vendor's lien is worth something, I suppose. I do not say that it is necessary to decide the point, and I only mention it to make more clear my view of this case, not as laying down the law for future occasions. But if an unpaid vendor's lien is worth something, on what principle could a vendor keep the unpaid vendor's lien and be paid for it by the insurers? In such a case he would be taking with both hands. Now why should not underwriters be entitled at all events to insist on the vendor's lien? As to specific performance, I say nothing. I am not familiar, as Cotton, L. J., is, with that branch of the law, and there may be some special

reasons why the insurers should not be able to insist upon specific performance; but why should not they insist upon the unpaid vendor's lien? The vendor, if he did not exercise it for their benefit, would be trying to make the contract between himself and the insurers more than a contract of indemnity. Chitty, J., seems to think that in this instance, it is necessary to recollect that the contract of sale was not a contract, either directly or indirectly, for the preservation of the buildings insured; that the contract of insurance was a collateral contract wholly distinct from, and unaffected by, the contract of sale. What does it matter? The beneficial interest of the vendors in the house depends on the contract being fulfilled or not, and the fulfillment of the contract lessens the loss, its non-fulfillment affects it. Chitty, J., indeed, says further that "the attempt now made is to convert the insurance against loss by fire into an insurance of the solvency of the purchaser." 8 Q. B. Div. 621. That may be answered in the same way. It is not that the solvency of the purchaser is guaranteed, but that the vendors are guaranteed against the loss which is diminished or increased according as the purchaser turns out to be solvent or not. The solvency of the purchaser affects the loss, — that is the only way in which it touches the insurance, — it is not because the insurance is directly an insurance of his solvency. Finally (and this is the last observation that I wish to make upon the judgment of Chitty, J.), he puts the case of a landlord insuring, and the tenant under no obligation to repair. He takes a case, "where under an informal agreement evidently drawn by the parties themselves, the large rent of £700 was reserved, and the tenant, notwithstanding the fire, was bound to pay the rent." He says, "Assume that the building in such a case was ruinous, and would last the length of the term only. Could the insurers recover a proportionate part of each payment of rent as it was made, or could they wait until the end of the term, and then say in effect, 'You have been paid for the whole value of the building, and therefore we can recover against you?'" That seems to me at first sight to look as if it were a very difficult point, but I think this difficulty diminishes, if it does not vanish, as soon as it is considered what are the conditions of the hypothesis. Is the learned judge supposing that the landlord, who is a person with a limited interest, did intend to insure all other interests besides his own? The landlord can do so if he so intended; the question is, has he done so? If the landlord intended to insure all other interests besides his own, the difficulty dissipates itself into thin air. If he did not, it would be a very odd case, and perhaps one might ride safely at anchor by saying that one would wait till it arose. But I

am not desirous of being over cautious, because I am satisfied to rest on the broad principle of indemnity, and I say, "Apply the broad principle of indemnity, and you have the answer." The vendor cannot recover for greater loss than he suffers, and if he has only a limited interest in the subject-matter, and only intends to insure that interest, I know of no means in law or equity by which he is entitled to obtain anything else out of the insurance office except what is measured by the measure of his loss. As to the form of action, I need add nothing to what has fallen already from the other members of the court. I am so much in accord with their views that I should not have added a judgment as long as mine has been if it were not for the very great importance, to my mind, of keeping clear in these insurance cases what is really the basis and foundation of all insurance law.

Judgment reversed.

2. TORT.

CONNECTICUT FIRE INSURANCE CO. *v.* ERIE RAILWAY CO.

73 N. Y. 399. — 1878.

Appeal from a judgment of the General Term, affirming a judgment in favor of defendant, entered upon an order setting aside a verdict in favor of plaintiff, and dismissing the complaint. (Reported below 10 Hun, 59.) This action was brought to recover the amount of a loss paid by plaintiff under a policy of insurance issued by it which loss it alleged was occasioned by defendant's negligence.

CHURCH C. J. — It must be assumed from the verdict of the jury that the buildings were burned through the negligence of the defendant's agents and servants, and it is too well settled to render the citation of authorities necessary, that as between the plaintiff, the insurer, and the defendant, the latter was ultimately liable for the loss. A fire policy is a contract of indemnity, and if a loss is occasioned by the wrongful act of another the insurer is subrogated to the rights and remedies of the assured, and may maintain an action against the wrongdoer. If the assured receives the damages from the wrongdoer before payment by the insurer, the amount so received will be applied *pro tanto* in discharge of the policy. *Hart v. Railroad Corp.*, 13 Metc. (Mass.) 99. If the wrong-doer pays the assured after payment by the insurer, with knowledge of the facts, it is regarded as a fraud upon the insurer, and he will not be protected from liability to the latter. *Clark v. Wilson*, 103 Mass. 223;

Insurance Co. v. Hutchinson, 21 N. J. Eq. 107; *Graff v. Kip*, 1 Edw. Ch. 621.

The question is presented in this case in a somewhat novel aspect, and unlike that of any other case to which our attention has been called. The plaintiff paid the policy after the release by the assured to the defendant, and by consenting to the judgment the payment must be regarded as voluntary on its part. If the plaintiff might have interposed the payment by the defendant to the assured, and the release as a defense to an action by the latter upon the policy, then the plaintiff cannot maintain this action. This question and the liability of the defendant depend upon the construction to be put upon the release, or rather if that construction be in favor of the plaintiff it will be unnecessary to notice any other point. The release is as follows:

“ Loss and Damage.

“ Erie Railway Company, to John Martin, Salisbury Mills, Dr.

“ For settlement in full of all claims, demands and causes of action against the Erie Railway Company for loss and damage by fire, claimed to have been caused by sparks or coals from engine, burning hotel building, barn, shed and contents, fences, trees, etc., at Salisbury station, on or about May 13, 1873, \$2,100.

“ This settlement is not intended to discharge the Connecticut Fire Insurance Company from any claim which said Martin has against them for insurance, but as a full settlement with, and discharge of, the Erie Railway Company only.

“ Received, September 10, 1873, of the Erie Railway Company, through the hands of R. L. Brundage, claim agent, two thousand one hundred dollars, in full of the above amount.

“ \$2,100.

John Martin.”

It is proper to refer to the surrounding circumstances. The buildings burned were worth about \$3,400. Of the consideration paid for the release \$300 was paid for a parcel of land conveyed to the defendant, leaving \$1,800 paid for the damage to the buildings. The clause that the settlement was not intended to discharge the plaintiff from any claim of the assured against it for insurance was in the nature of a proviso or exception from the general purview of the release. It must be construed so as to carry out the intent of the parties, and that intent must be determined from the language viewed in the light of surrounding circumstances. It is evident that the assured did not receive the full amount of the damages incurred. This circumstance sheds some light upon the meaning of

the release. The clause was intended for some purpose, and it seems to me obvious that it was designed to prevent the plaintiff from interposing the release as a defense to an action on the policy, and it is inferable that the amount of the policy was deducted from the amount of the loss in the settlement with the defendant. The substance of the transaction was that the assured, having a claim against the plaintiff for \$1,500, settled with and released the defendant from liability for the balance, retaining the claim against the plaintiff. The form of the clause is not very specific, but looking at the substance it was a proviso that the release should not operate to prevent a recovery upon the policy against the plaintiff. With such a proviso, other portions of the release would have to yield to enable the proviso to have effect, and as to the plaintiff it would be the same as though no release had been given. It follows that the plaintiff could not have interposed the release as a defense in an action by the assured upon the policy, and if not, the logical sequence is that the right of subrogation inures against the defendant.

It is insisted that as the assured has settled and released all his claim for damages, the plaintiff could acquire no right or remedy through him by equitable subrogation, or from him by assignment. This proposition implies an assumption of the controverted fact whether the assured did release all claim. The answer to it is that the assured released only such damages as he could without interfering with his claim against the plaintiff, and the legal consequences must be regarded as a part of the exception, viz., the right of the plaintiff to a remedy over. This was as much reserved as the right to enforce the policy. That right could not be reserved without reserving the remedy. The power to enforce the policy having been expressly reserved, the parties could not take away the right of the plaintiff to the remedy which that reservation vested in him by law. Having made their agreement so as to prevent the plaintiff from interposing this defense, they cannot object to the consequences which legally flow from it. The exception necessarily embraces the right of subrogation. It is not needful to consider whether the effect would have been different if the assured had received the full amount of the loss. No injustice is done the defendant by the result indicated. It was liable for the whole loss, and the payment to the plaintiff of the amount of the policy will, with that already paid, not exceed that amount. It did not profess to pay the assured but a part of that amount, nor did the assured intend to receive but a part, and the legal construction of the contract accords with the principles of right and justice.

The action is properly brought in the name of the plaintiff. No

other person has any right or interest in the claim. Code, § 111; *Cummings v. Morris*, 25 N. Y. 627.

The judgment must be reversed and judgment ordered on verdict.
All concur, except MILLER, J., absent.

Judgment accordingly.

3. CARRIERS.

PHŒNIX INSURANCE CO. v. ERIE AND WESTERN TRANSPORTATION CO.

117 U. S. 312. — 1886.

LIBEL in admiralty against a common carrier by an insurance company which had insured the owners upon the goods carried, and had paid them the amount of the insurance, and claimed to be subrogated to their rights against the carrier. The bill of lading provided that the carrier was not to be liable for loss or damage by fire, collision, or dangers of navigation, and that the carrier when liable for the loss "shall have the full benefit of any insurance that may have been effected upon, or on account of" the goods. The policy contained no stipulation upon the subject of subrogation. The defense relied upon was the provision in the bill of lading that the carrier was to have the benefit of any insurance. The District Court held the provision to be valid, and that no right of subrogation accrued to the libellant. Upon appeal the Circuit Court found as a conclusion of law that the libellant did not succeed to the rights of action of the shippers.

MR. JUSTICE GRAY. — * * * The policy of insurance contains no express stipulation for the assignment to the insurer of the assured's right of action against third persons. In the bills of lading, it is expressly stipulated that the carriers, whose railroad or vessels form part of the line of transportation, shall not be liable for loss or damage by fire, collision, or dangers of navigation; and that each carrier shall be liable only for a loss of the goods while in its custody, "and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods."

The question is, whether under these circumstances the insurer, upon payment of a loss, became subrogated to the right to recover damages from the carrier. When goods insured are totally lost, actually or constructively, by perils insured against, the insurer, upon payment of the loss, doubtless becomes subrogated to all the

assured's rights of action against third persons who have caused or are responsible for the loss. No express stipulation in the policy of insurance, or abandonment by the assured, is necessary to perfect the title of the insurer. From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods, or from damages paid by third persons for the same loss. But the insurer stands in no relation of contract or of privity with such persons. His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter. In a court of common law, it can only be asserted in his name, and, even in a court of equity or of admiralty, it can only be asserted in his right. In any form of remedy, the insurer can take nothing by subrogation but the rights of the assured. *Comegys v. Vasse*, 1 Pet. 193, 214; *Fretz v. Bull*, 12 How. 466, 468; *The Monticello*, 17 How. 152, 155; *Garrison v. Memphis Ins. Co.*, 19 How. 312, 317; *Hall v. Railroad Cos.*, 13 Wall. 367, 370, 371; *The Potomac*, 105 U. S. 630, 634, 635; *Mobile & Montgomery Railway v. Jurey*, 111 U. S. 584, 594; *Clark v. Wilson*, 103 Mass. 219; *Simpson v. Thomson*, 3 App. Cas. 279, 286, 292, 293. That the right of the assured to recover damages against a third person is not incident to the property in the thing insured, but only a personal right of the assured, is clearly shown by the fact that the insurer acquires a beneficial interest in that right of action, in proportion to the sum paid by him, not only in the case of a total loss, but likewise in the case of partial loss, and when no interest in the property is abandoned or accrues to him. *Hall v. Railroad Cos.*, *The Potomac*, *Simpson v. Thomson*, above cited.

The right of action against another person, the equitable interest in which passes to the insurer, being only that which the assured has, it follows that if the assured has no such right of action, none passes to the insurer; and that if the assured's right of action is limited or restricted by lawful contract between him and the person sought to be made responsible for the loss, a suit by the insurer, in the right of the assured, is subject to like limitations or restrictions. For instance, if two ships, owned by the same person, come into collision by the fault of the master and crew of the one ship and to the injury of the other, an underwriter who has insured the injured ship, and received an abandonment from the owner, and paid him the amount of the insurance as and for a total loss, acquires thereby no right to recover against the other ship, because the assured, the

owner of both ships, could not sue himself. *Simpson v. Thomson*, above cited; *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50, 68.

Upon the same principle, any lawful stipulation between the owner and the carrier of the goods, limiting the risks for which the carrier shall be answerable, or the time of making the claim, or the value to be recovered, applies to any suit brought in the right of the owner, for the benefit of his insurer, against the carrier; as, for instance, if the contract of carriage expressly exempts the carrier from liability for losses by fire, *York Co. v. Central Railroad*, 3 Wall. 107; or requires claims against the carrier to be made within three months, *Express Co. v. Caldwell*, 21 Wall. 264; or fixes the value for which the carrier shall be responsible, *Hart v. Pennsylvania Railroad*, 112 U. S. 331. So the stipulation, not now in controversy, in the bills of lading in the present case, making the value of the goods at the place and time of shipment the measure of the carrier's liability, would control, although in the absence of such a stipulation the carrier would be liable for the value at the place of destination, as held in *Mobile & Montgomery Railway v. Jurey*, 111 U. S. 584. The stipulation in these bills of lading, that the carriers "shall not be liable for loss or damage by fire, collision, or the dangers of navigation," clearly does not protect them from liability for any loss occasioned by their own negligence. By the settled doctrine of this court, even an express stipulation in the contract of carriage, that a common carrier shall be exempt from liability for losses caused by the negligence of himself and his servants, is unreasonable and contrary to public policy, and therefore void. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Railroad Co. v. Pratt*, 22 Wall. 123; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Railway Co. v. Stevens*, 95 U. S. 655. And it may be that, as held by Judge Wallace in a case in the Circuit Court, a stipulation that "no damage that can be insured against will be paid for" would not protect the carrier from liability for his own negligence, because that would be to compel the owners of the goods to insure against the negligence of the carrier. *The Hadji*, 22 Blatchford, 235.

But the stipulation upon the subject of insurance, in the bills of lading before us, is governed by other considerations. It does not compel the owner of the goods to stand his own insurer, or to obtain insurance on the goods; nor does it exempt the carrier, in case of loss by negligence of himself or his servants, from liability to the owner, to the same extent as if the goods were uninsured. It simply provides that the carrier, when liable for the loss, shall have the benefit of any insurance effected upon the goods.

It is conclusively settled, in this country and in England, that a

policy of insurance, taken out by the owner of a ship or goods, covers a loss by perils of the sea or other perils insured against, although occasioned by the negligence of the master or crew or other persons employed by himself. *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213; *Copeland v. New England Ins. Co.*, 2 Met. 432; *General Ins. Co. v. Sherwood*, 14 How. 351, 366; *Davidson v. Burnand*, L. R. 4 C. P. 117, 121. Any one who has made himself responsible for the safety of goods has a sufficient interest in them to enable him to obtain insurance upon them. * * * As the carrier might lawfully himself obtain insurance against the loss of the goods by the usual perils, though occasioned by his own negligence, he may lawfully stipulate with the owner to be allowed the benefit of insurance voluntarily obtained by the latter. This stipulation does not, in terms or in effect, prevent the owner from being reimbursed the full value of the goods; but being valid as between the owner and the carrier, it does prevent either the owner himself, or the insurer, who can only sue in his right, from maintaining an action against the carrier upon any terms inconsistent with this stipulation.

Nor does this conclusion impair any lawful rights of the insurer. His right of subrogation, arising out of the contract of insurance and payment of the loss, is only to such rights as the assured has, by law or contract, against third persons. The policy containing no express stipulation upon the subject, and there being no evidence of any fraudulent concealment or misrepresentation by the owner in obtaining the insurance, the existence of the stipulation between the owner and the carrier would have afforded no defense to an action on the policy, according to two careful judgments rendered in June last and independently of each other, the one by the English Court of Appeal, and the other by the Supreme Judicial Court of Massachusetts. *Tate v. Hyslop*, 15 Q. B. D. 368; *Jackson Co. v. Boylston Ins. Co.*, 139 Mass. 508. In *Tate v. Hyslop*, owners of goods, insured against risks in crafts or lighters, had previously agreed with a lighterman that he should not be liable for any loss in crafts except loss caused by his own negligence, and did not disclose this agreement to the underwriters at the time of procuring the insurance. The sole ground on which it was held that the owners could not recover on the policy was that this agreement was material to the risk, because the underwriters, as the assured knew, had previously established two rates of premium, depending on the question whether they would have recourse over against the lighterman. Lord Justice Brett observed that, but for the two rates of premium established by the underwriters and known to the assured, the

omission of the assured to disclose their agreement with the lightermen could only have affected the amount of salvage which the underwriters might have, and would have been immaterial to the risk, and consequently to the insurance. 15 Q. B. D. 375, 376. In *Jackson Co. v. Boylston Ins. Co.*, it was adjudged that, in the absence of any fraud or intentional concealment, the undisclosed existence of a stipulation between the assured and the carrier, like that now before us, afforded no defense to an action on the policy.

It may be added that our conclusion accords with the decision of Judge Shipman in *Rintoul v. New York Central Railroad*, 21 Blatchford, 439, as well as with those of Judge Dyer in the District Court, and Judge Drummond in the Circuit Court, in the present case. 10 Bissell, 18, 38. See also *Carstairs v. Mechanics' & Traders' Ins. Co.*, 18 Fed. Rep. 473; *The Sidney*, 23 Fed. Rep. 88; *Mercantile Ins. Co. v. Cables*, 20 N. Y. 173.

Decree affirmed.

MR. JUSTICE BRADLEY, dissented.

FAYERWEATHER ET AL. v. PHENIX INSURANCE CO.

118 N. Y. 324. — 1890.

APPEAL from Superior Court of New York city, General Term Action by Daniel B. Fayerweather and Henry S. Ladew against the Phenix Insurance Company. A judgment dismissing the complaint was affirmed by the General Term of the Superior Court, and plaintiffs appeal.

FOLLETT, C. J. — The plaintiffs were the owners of 211 bales of leather, which the Old Dominion Steam-Ship Company undertook to transport by its steamer *Guyandotte* from Norfolk, Va., to New York, and deliver to the owners. The vessel reached New York June 17, 1885, with the leather safe on board, and within twenty-four hours after arrival she sunk at her dock through the negligence of the employees of the steamship company. By this accident the leather was injured, as it is agreed, to the plaintiffs' damage in the sum of \$1,295.32. In considering this case the liability of the carrier to the owners of the leather for this loss will be assumed.

The bill of lading under which the leather was shipped contained this provision: "It is further stipulated and agreed that in case of any loss, detriment, or damage to be sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred by the terms

of this contract, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of happening of such loss, detriment, or damage, *and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.*"

The defendant insured the plaintiffs against the loss sustained by them, by an open, time, marine policy, which contained these provisions: "In the event of loss, the assured agrees to subrogate to the insurers all their claims against the transporters of said merchandise, not exceeding the amount paid by said insurers. * * * In case of any agreement or act, past or future, by the insured, whereby any right of recovery of the insured, against any persons or corporations, is released or lost, which would, on acceptance of abandonment or payment of loss by this company, belong to this company, but for such agreement or act, or in case this insurance is made for the benefit of any carrier or bailee of the property insured other than the person named as insured, the company shall not be bound to pay any loss; but its right to retain or recover the premium shall not be affected."

This action is prosecuted by the assured owners to recover from the insurer their loss so sustained; and it is defended on the ground that the owners violated the provision of the contract of insurance above quoted by contracting with the carrier, without the insurer's knowledge, that the carrier, in case of liability for loss, should have the benefit of the insurance, and, in effect, that the insurer, on paying the owners' loss, should be deprived of its right to be subrogated to the owners' right of action against the carrier for injury to the leather. When goods in the hands of a common carrier for transportation are insured by the owner, and are subsequently lost or injured under circumstances rendering the carrier liable to the owner for the damages, and the insurer pays the loss to the owner, the insurer, in the absence of stipulations between the carrier and owner defeating the right, is entitled to be subrogated to the rights and remedies of the owner against the carrier. *Hall v. Railroad Co.*, 13 Wall. 367; *Insurance Co. v. Railway Co.*, 73 N. Y. 399; *Sheld. Subr.*, § 329. But the struggle between carriers and insurers to escape the liability imposed under the usual bills of lading and policies, by casting the burden of the loss upon the other by the insertion of unusual and astute provisions in their respective contracts with the owner, has rendered this simple rule of law quite inapplicable to many of the cases arising under such special contracts.

The provision quoted from the bill of lading cut off the insurer's

right to be subrogated to the rights and remedies of the owner against the defaulting carrier. *Insurance Co. v. Calebs*, 20 N. Y. 173; *Platt v. Railroad Co.*, 20 J. & S. 496, affirmed 108 N. Y. 358, 15 N. E. Rep. 393; *Insurance Co. v. Transportation Co.*, 10 Biss. 18, affirmed 117 U. S. 312, 6 Sup. Ct. Rep. 750, 1176, and 118 U. S. 210, 7 Sup. Ct. Rep. 25. It has been held, (*Jackson Co. v. Insurance Co.*, 139 Mass 508, 2 N. E. Rep. 103), in an action by the owner against the insurer for the recovery of a loss covered by the policy, and caused by the actionable negligence of the carrier, that a stipulation between the owner and carrier, giving the latter the benefit of an insurance upon the goods, is not a defense to the insurer, and that a provision in the policy "that this insurance shall be void in case the policy, or the interest insured thereby, shall be sold, assigned, transferred, or pledged without the consent in writing of the insurer," is not violated by the agreement between the owner and carrier that the latter should have the benefit of any insurance on the goods carried.

In *Inman v. Railway Co.*, 129 U. S. 128, 9 Sup. Ct. Rep. 249, the defendant, a common carrier, transported cotton, under a bill of lading which contained a stipulation that the carrier incurring any legal liability for the loss of the cotton "shall have the benefit of any insurance which may have been effected upon or on account of said cotton." The owners insured the cotton under policies which contained this stipulation: "And any act of the insured waiving or transferring, or tending to defeat or decrease, any such [the insurer's] claim against the carrier, or such other person or persons, whether before or after the insurance was made under this policy, shall be a cancellation of the liability of the said insurance company for or on account of the risk insured for which loss is claimed. In event of loss the assured agrees to subrogate to the insurers all their claims against the transporters of said cotton, not exceeding the amount paid by said insurers." The cotton was lost by the negligence of the carrier. The insurers adjusted the loss, but did not pay the owner, agreeing with him that he should sue the carrier without prejudice to his claims under the policies, and that interest should be allowed upon the claim as adjusted until it could be collected. The assured owner sued the carrier, which defended on the ground that by the stipulation in the bill of lading it was entitled to the insurance effected on the cotton, which the owner had nullified by accepting a policy containing the stipulation quoted. It was held that the stipulation in the policy was not a defense. It is unnecessary to determine whether the reasons given for the judgment in the case last cited can be harmonized with the reasons given

for the judgments in the previous cases hereinbefore cited, because none of the cases determine the precise question presented in the case at bar.

The plaintiffs in this action expressly stipulated that they would make no agreement, nor do any act, whereby their right of action against the carrier for losing or injuring the leather should be released or cut off, and that, in case the carrier became liable to the plaintiffs for losing or injuring the leather, the defendant, the insurer, on paying the loss, should be subrogated to their right of action against the carrier. By the contract entered into between the plaintiffs and the carrier, the rights stipulated for by the insurer have been wholly nullified and cut off, which defeats the plaintiffs' right to recover on the policy. *Carstairs v. Insurance Co.*, 18 Fed. Rep. 473.

The judgment should be affirmed, with costs. All concur, except HAIGHT, J., not voting.

Judgment affirmed.

4. LESSOR AND LESSEE.

DARRELL *v.* TIBBITTS.

5 Q. B. D. 560. — 1880.

FORBES was the owner of a house in Brighton; he demised it to certain persons named Bonner by a lease, which rendered the lessees bound to repair, "except casualties by fire, demolition by storm or tempest of the building or any part thereof, or destruction by foreign enemies." Forbes insured the house in the Union Society (of which the plaintiff was secretary), by a policy against fire covering injury by explosions of gas. In 1877 the corporation of Brighton repaired the streets by a steam roller, which owing to its weight damaged a pipe and caused an escape of gas into the house demised to Bonner, where it exploded and did considerable damage. Forbes sold the house and the policy to the defendant, and after some negotiation the Union Society paid to the defendant a sum of 750*l.* The lessees received compensation from the corporation of Brighton for the damage done to the house by the explosion, and with the sum received reinstated the house. At the time when the Union Society paid to the defendant the sum of 750*l.* they were unaware that by the terms of the lease the lessees were bound to make good injuries done by an explosion of gas. The Union Society, upon hearing that the house had been reinstated by Bonner, claimed from the defendant the sum of 750*l.*, and upon his refusal brought the pres-

ent action in the name of the plaintiff. Lush, J., gave judgment for the defendant.

The plaintiff appealed.

BRETT, L. J. — * * * It seems to me, according to the principle of *North British and Mercantile Insurance Co. v. London, Liverpool, and Globe Insurance Co.*, 5 Ch. Div. 569, that if the tenants had not repaired the damage, and had declined to do so, the insurance company would have been bound to pay the landlord who had insured with them, but would have had a right to bring in his name an action against the tenants, and recover from the tenants what they had paid to the landlord; in other words, a policy of fire insurance is a contract of indemnity similar to that which is contained in a policy of marine insurance. That case seems to me further to shew that if the landlord had sued the tenants before he received payment from the insurance company, he must have recovered from them, for it would have been no answer by the tenants that the landlord was insured. That case seems to me also to decide this, that if the landlord had recovered damages from the tenants equivalent to the injury done to him by the refusal of the tenants to repair, he could not afterwards sue the insurance company. The landlord was paid by the insurance company at a time when they could not resist his demand, as they were bound by their contract to pay. Afterwards the corporation of Brighton, by whose negligence the mischief happened, paid the amount of damage to the defendant's house, and this amount was expended in making good the damage. I think, however, that the case stands in the same position as if the tenants had executed the repairs with their own moneys.

The question now arises whether the insurance company who paid the money to the landlord at a time when they were obliged to pay by virtue of their contract, can recover it back because the tenants have done that which they could not avoid doing; if they had not repaired, they must have paid damages to the landlord. If the company cannot recover the money back, it follows that the landlord will have the whole extent of his loss as to the building made good by the tenants, and will also have the whole amount of the loss paid by the insurance company. If that is so, the whole doctrine of indemnity would be done away with; the landlord would be not merely indemnified, he would be paid twice over. A technical difficulty arises in my mind as to the ground upon which the landlord can be held liable in this action, but it is a difficulty which ought to be surmounted. I do not think that the money can be recovered back upon the ground that the consideration for the payment of

the money has wholly failed; because the premium upon the policy is part of the consideration and, no one supposes that the premium is to be returned. But it seems to me that according to all rules of law we have a right to imply a promise on the part of the landlord to the insurance company at the time of payment by them, that if the loss should be afterwards made good by the tenants, he would repay the money which he received from the insurance company. I think that the landlord is liable on another ground also. The doctrine is well established that where something is insured against loss either in a marine or a fire policy, after the assured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-matter insured, and with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safety of the subject-matter insured by reason of the peril insured against. So that immediately after the insurance company had paid the landlord, they were put into his place with regard to the contract to rebuild, which was a contract respecting the subject-matter insured, that is, the building, and which contract was affected by the safety, or the loss of that building by reason of the explosion, which was a peril insured against, and therefore they are to be subrogated or to be put into the place of the landlord with regard to his rights; they might have sued in his name the tenants if the latter had not repaired, and when the tenants have repaired, the insurance company are to have the benefit of those repairs.

Judgment must be entered for the plaintiff.

Judgment reversed and entered for the plaintiff for 750*l*.

[Concurring opinions were also rendered by COTTON and THESIGER, L. JJ.]

WEST OF ENGLAND FIRE INS. CO. *v.* ISAACS.

[1897] 1 Q. B. 226. — 1896.

APPEAL from the judgment of COLLINS, J., reported [1896] 2 Q. B. 377.

The plaintiffs, an insurance company, paid to the defendant a sum of 100*l*. in respect to a claim under a policy of insurance arising under the following circumstances. Certain premises were demised for a term to expire in December, 1894, the lease containing covenants by the lessee to repair and leave in repair, and also to insure in the Royal Exchange Assurance Corporation in the joint names

of the lessors and lessee. Under this lease one Bennett became lessee and effected a policy on the premises in the above-mentioned office in the joint names of himself and the lessors. He then sublet to the defendant a warehouse, which was part of the premises, for the residue of the term less ten days. The sub-lease contained covenants on the part of the defendant to repair and leave in repair, and a covenant by Bennett, the lessor, to insure the premises, and to lay out the moneys received under any insurance policy in making good damage by fire, with a proviso that if such moneys proved insufficient the defendant was to remain liable, under his covenant to repair, to make good the deficiency. The defendant effected, in his own name, an insurance against fire with the plaintiffs upon the warehouse demised to him by the sub-lease. During the existence of the sub-lease a fire happened by which the warehouse was damaged. Bennett had died before the fire took place, and subsequently to that event Bennett's interest became vested by order made in the Chancery Division of the High Court in one Jones. Notice to repair, accompanied by a specification or schedule of dilapidations, was given under the original lease by the lessors to Jones, who in turn gave notice to repair, with a schedule of dilapidations, to the defendant. Jones died shortly afterwards, and his executors demanded payment from the Royal Exchange Office of 100*l.*, the amount at which the fire damage to the warehouse had been agreed by both insurance offices and the defendant. The plaintiffs were sued by the defendant upon their policy, and paid him 100*l.*, the agreed amount of the damage to the warehouse. At that time the plaintiffs admittedly knew of the existence of the Royal Exchange policy.

Subsequently to the above proceedings and in December, 1894, the lease expired. Later on the original lessors brought an action against Jones' executors to recover damages for breaches of the covenant to repair contained in the original lease, and thereupon Jones' executors brought a similar action against the defendant for a breach of the covenants in the sub-lease. The first mentioned action was settled by payment of a sum of 250*l.*, and the action by Jones' executors against the defendant was settled by his paying 140*l.* to Jones' executors, who gave him a receipt for all claims under the schedule of dilapidations, which included damage by fire. The defendant at the same time undertook not to bring any action against Jones' executors for breaches of covenant contained in the sub-lease. Jones' executors pressed their claim against the Royal Exchange office under their policy, and the company paid 100*l.* in discharge of their liability.

This action was brought by the plaintiffs to recover 100*l.* from the defendant, upon the ground that on settling with Jones' executors the defendant had had the benefit of the payment made under the Royal Exchange policy, or of the covenant in the sub-lease on the part of the predecessors in title of Jones' executors, or, alternatively, that the defendant was bound to make good to the plaintiffs the full value of the rights against his lessor which, for his own reasons, he has renounced, to which rights, but for such renunciation, the plaintiffs would have been entitled to be subrogated.

The learned judge gave judgment in favor of the plaintiffs. [1896] 2 Q. B. 377. The defendant appealed.

Channell, Q. C., and *Edward Pollock*, for the defendant. The defendant gave up no right, or if he did give up any right it was valueless. When Jones' executors sued the defendant both the terms under the lease and the sub-lease had come to an end, and the executors could not reinstate the premises. Consequently, an action by the defendant against them could not have resulted in more than nominal damages. In *Darrell v. Tibbitts*, (1880) 5 Q. B. D. 560, *Cotton, L. J.*, says: "If the company had known of the covenants in the lease, and of the actual position of the parties, it might have been said that they paid without requiring the covenant to be enforced, and therefore had lost their remedy." Here it is clear that the plaintiffs knew of the covenants in the sub-lease, and by paying with that knowledge they lost their right to take advantage of these covenants. The law laid down by the learned judge is not disputed, but only its applicability to the facts.

Cohen, Q. C., and *Wood Hill*, for the plaintiffs. The full loss has been paid by each of two insurers. One of them, the Royal Exchange Office, could not avoid paying, and, consequently, the other, the plaintiffs, are exempt, and can recover back the money they have paid to the defendant. The defendant got the benefit of giving up the claim under the sub-lease, because by agreeing to do so he paid less than he would otherwise have been obliged to pay. That benefit is properly measured by the agreed amount of the damage by fire — that is, 100*l.*

[They cited *North British and Mercantile Insurance Co. v. London, Liverpool, and Globe Insurance Co.*, (1877) 5 Ch. D. 569, and *Castellain v. Preston*, (1883) 11 Q. B. D. 380.]

Channell, Q. C., in reply. The payment of 100*l.* by the plaintiffs to the defendant covered his liability to his lessors, and therefore covered their loss, so that they were not entitled to call on the Royal Exchange Office to pay anything, and their having paid cannot affect the rights of the plaintiffs and the defendant between themselves.

LORD ESHER, M. R. — In this case there were some premises insured against fire in two insurance offices, and there has been a fire, and in respect of that each of the offices has paid 100%. The question is whether that state of things can stand. For the plaintiffs it is said that the cases show that the situation must be got rid of, and I think it can be by the application of well known principles.

The action is by one of the insurance companies, and the plaintiffs do not say that they were not bound to pay on their contract; but they say that on their doing so any remedy which the defendant has against anybody in respect of the damage is subrogated to them, and that the defendant had no right to deal with such a claim to the prejudice of the plaintiffs. That proposition is not disputed on behalf of the defendant. Did he, then, deal with any rights he had against third parties? He had a right against the person who was in the position of being the lessor at that time arising out of a covenant in the lease that the lessor would insure the premises against loss by fire, and expend any money received under the insurance as far as might be necessary in restoring the damage done by the fire. There was some suggestion that there was no one whom the defendant could have sued on that covenant; but the position at the time of the fire was that Jones had taken upon himself the fulfillment of the covenant, and that the defendant had agreed to be tenant upon these terms. The lessor was bound to endeavor to recover from the Royal Insurance Company, and to spend any money recovered in putting the premises to rights. If that had been done before the present plaintiffs had been called on to pay, as they were only bound to indemnify the defendant, they would not have had to pay anything. They now say that, having paid under their policy, they are entitled to the right which the defendant had to insist that Jones should expend the money he had received in repairing the damage done by the fire, and that they ought to be in a position to force Jones to do this, or to recover damages from him for his breach of covenant in not doing it. Inasmuch as the damage by the fire was agreed at 100%, they say that would be the amount of damages that they would have been entitled to recover from Jones. The defendant has given up this right of action against Jones, so that the plaintiffs can never recover that amount, and the course taken by the defendant has damaged the plaintiffs to that extent. The plaintiffs claim that this gives them a right to recover that amount in their action. This was the view taken by the learned judge; and it seems to me that it is perfectly right, and in accordance with the law of insurance. I think,

therefore, that the plaintiffs were entitled to succeed, and that the appeal should be dismissed.

LOPES, L. J. — I am of the same opinion.

RIGBY, L. J. — I agree. I wish to say a few words about the position of the lessor and the lessee. Under the sub-lease there was a general covenant to repair and to yield up in repair; but a special provision was made, for the case of damage by fire, that the lessor should insure against such damage and should lay out all moneys received in respect to such insurance in rebuilding or reinstating the premises destroyed or damaged. Then came a proviso that the lessee should remain liable to make good any damage which the money received by virtue of any such insurance should be inadequate to repair. The liability of the lessee to the lessor was to make good any damage that the 100/, the agreed amount in this case, would not cover, and he was entitled to insist on the 100/ being expended on the repairs. He has so dealt with the lessor that no one can now get the 100/, for he has already got the full benefit of it. The substance of the thing is that he paid 140/ without requiring that diminution of liability to which he was entitled. He may have got the full 100/ or more; but at any rate, he so dealt with the insurance that the plaintiffs cannot obtain it from the lessor, and they are entitled to recover it in this action.

Appeal dismissed.

5. MORTGAGOR AND MORTGAGEE. — LIENHOLDER.

HONORE v. LAMAR FIRE INSURANCE CO.

51 ILLS. 409. — 1869.

THE question presented in this case arises on this state of facts: Honore, the appellant, having executed his note to Rutter, Endicott & Whitehouse, for \$2,146.50, deposited with them, as collateral security, seventy-four barrels of whiskey. They effected an insurance on the whiskey, at their own expense, in their own name, and without the authority or knowledge of Honore. The whiskey was subsequently destroyed by fire, and the insurance company paid the policy to Rutter, Endicott & Whitehouse, first requiring an assignment of the note, to secure which the whiskey was deposited.

MR. JUSTICE LAWRENCE. — The appellant executed his note to Rutter, Endicott & Whitehouse, for \$2,146.50, and deposited with them, as collateral security, seventy-four barrels of whiskey. They effected an insurance on the whiskey in the Lamar Fire Insurance

Company, appellees herein, at their own expense, and in their own name, and without the authority, or even knowledge, of appellant. The whiskey was subsequently destroyed by fire, and the company paid the policy to Rutter, Endicott & Whitehouse, first requiring an assignment of appellant's note. The note was accompanied by a power of attorney to confess a judgment, and the company having caused a judgment to be confessed, the appellant filed a bill to enjoin its collection. On the hearing the Circuit Court dismissed the bill.

If the insurance had been effected at the request or by the authority of appellant, or at his expense, or under circumstances that would make him chargeable with the premium, we should have no difficulty in holding him entitled to its benefits, by applying the money paid in extinguishment of so much of his debt. But none of these circumstances are presented by this record. The appellant prosecutes his appeal merely upon the ground that, in all cases where a mortgagee insures the mortgaged property, the mortgagor is entitled to the benefits of the policy.

This position is maintainable neither upon principle nor authority. The contract of insurance, it has been often remarked, is one of indemnity merely. Any person having an interest in property may, through an insurance, indemnify himself against loss by fire. Mortgagor and mortgagee have each an insurable interest. The interest of both may be covered in one policy, or each may take out a separate policy. In this case the mortgagees insured at their own cost, without privity with the mortgagor and without his knowledge, and when the company paid the debt due them from the mortgagor, it indemnified them against loss and was entitled to be subrogated to their claim. The mortgagor, having had no connection with the insurance, cannot claim its benefit. As the premium was not paid by him or chargeable to him, as he was not aware even that an insurance had been effected until after the fire, it is difficult to see how such insurance, even when paid, can affect his liability upon his note. Even the case of *King v. The State Mutual Fire Insurance Co.*, 7 Cush. 10, on which the appellant chiefly relies, holds that in such cases the liability of the mortgagor upon his note remains the same, but that the mortgagee may recover it for his own use, although already paid by the insurance company. Certainly it is much more consonant to every principle of equity to say that the debt may be recovered for the benefit of the insurance company, than that the mortgagee should be twice paid. The doctrine of that case would sanction wager policies, and furnish a dangerous temptation to incendiarism.

That the insurance company is entitled to be subrogated to the claims of the mortgagee, in such a case as the present, is held in *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 501, *Sussex Ins. Co. v. Woodruff*, 2 Dutcher, 555, and *Etna Fire Ins. Co. v. Tyler*, 16 Wend. 397. In concord, *Am. Ins. Co. v. Woodbury*, 45 Me. 452, where the assured had voluntarily assigned his claim to the insurance company upon payment by it, as in the present case, the court held the company entitled to recover. The question of the right to subrogation against the will of the mortgagee, was not presented in that case, nor is it in this, because the assignment was made by the mortgagee upon payment of the loss. The only question strictly presented here is, whether the mortgagor has been discharged from his debt by the payment of the mortgagee's policy, and on this point there is no disagreement among the authorities. The debt is still in existence, and the strong equity of the insurance company has been united to the legal title.

The Circuit Court committed no error in dismissing the bill.

Decree affirmed.

NELSON ET AL. v. BOUND BROOK MUTUAL FIRE INS. CO.

43 N. J. Eq. 256. — 1887.

KNAPP, J. — Mrs. Nelson, the appellant, took out from the respondent company a policy of insurance against loss by fire on certain buildings on the farm owned and occupied by her at the time. The buildings were burned, and the company paid to her the amount of the loss. Before the destruction of the buildings, the appellant, Mrs. Nelson, by a verbal agreement with her two sons, bargained for a sale to them of the entire property for \$3,000, one-half to be paid in cash or its equivalent, the balance to be secured to her by bond and mortgage on the property. It was further stipulated between them that, upon the execution of the conveyance, the vendees should have an assignment of the policy to them as owners, and re-assign it to her as collateral security upon her mortgage. In the *interim*, the policy should remain for their joint protection on the building, the vendees engaging to pay all subsequent assessments on the policy. No time was appointed for concluding the transaction, but the parties chancing to meet at the office of a conveyancer had the deed and mortgage drawn. The deed was signed and acknowledged by the vendor, and left by the parties with the county clerk to be recorded. The mortgage was signed and acknowledged by the vendees and the wife of one of

them who was present, and its custody given to the vendor to hold until the absent wife could be brought to sign it, when the balance of the purchase-money was to be adjusted and the insurance as arranged for effected in completion of the bargain. Before the parties met again after the execution of the papers the fire occurred. Upon paying the insurance money by the company, an assignment of this mortgage to it was formally demanded of Mrs. Nelson. She refused to assign it, and the respondents filed a bill praying subrogation to her rights under the mortgage, and that she be decreed to assign it to the company. The court below so decreed, and from that decree the defendants below appealed.

The policy which Mrs. Nelson held was the ordinary one insuring her as owner against loss by fire. It expressed no undertaking on her part to assign to the underwriters, in any event, the whole or any part of the property insured, or any interest in or security which she might hold against it. The respondent's right to such decree, not resting upon express contract, must be based upon special circumstances such as give it just claim to that advantage. To decree it when not founded in conventional right is the ministration of a pure equity, and one claiming it must show that it is due to him, and is not unjust or inequitable to other parties in interest. *Ker-nochan v. Bowery Ins. Co.*, 17 N. Y. 428. The respondent does not rely upon the terms of its contract to support its present claim but bases it upon changes in the relation of the assured toward the property through the contract of sale, which it alleges create other rights and duties between the insurer and the insured, out of which comes this resulting equity. It is said that through the sale to her sons she ceased to be owner and became mortgagee for part of the consideration, thereby cutting down her insurable interest as owner to that of a lien for the payment of her debt, and reducing the obligation of the insurer from an undertaking of absolute indemnity against loss on the property to a special indemnity against loss on her mortgage debt; that as an insurer of the interest of a mortgagee, the right to subrogation to the security arises on payment of the debt.

Conceding that a mortgagee, who, on his own behalf and for his own protection solely, takes out a policy to secure his mortgage debt, may be called upon to assign his security to the insurer who pays his debt on the occurrence of a loss, it becomes an essential fact for the complainant to establish in maintenance of its theory that Mrs. Nelson had changed her character as owner to that of mortgagee. If the treaty between herself and her sons for the conveyance of the property was at the time of the loss by fire in an

incomplete and inchoate state, a mere executory contract, no steps in its progress toward final execution can be seized hold of to determine her real *status*. She remained, in legal contemplation, the owner until within the intention of the parties the contract became executed in all its essential terms. Until then, loss on the property in risk was her loss, and under the terms of the policy the company was bound to pay in discharge of its contract obligation.

The parties to the contract of sale appear to have been fully agreed upon the terms of their bargain. Those terms have already been recited in sufficient detail for our purposes, and they meet with no substantial contradiction in the evidence. The transaction was intended by the parties to be an entire one, and in their minds was not regarded as an executed agreement when the deed and mortgage were exchanged, nor was it to become so until the execution of the mortgage was perfected as stipulated for, the balance of the consideration-money paid and adjusted, and the building protected by insurance for the interest and benefit of both. The execution of the papers needed in the transfer of title was for the convenience of the parties who lived at a distance from each other; and it was between those whose relations suggest trust and confidence. What was done respecting the conveyance was not regarded by the parties as the conclusion of their bargain, nor was the bargain considered by them as attaining completion until the balance of the consideration should be paid and insurance effected. I think it is clear that at the time of the fire the treaty for the sale of the property, which on its execution would change Mrs. Nelson's rights as owner to those of mortgagee was *in fieri*, and her ownership remained. This conclusion is not disturbed by the suggestion of counsel that the appellant, Mrs. Nelson, has a vendor's lien for the balance of the purchase-money which she can enforce in equity against her vendees. In the contract to sell she did not contemplate any such reliance for payment. She bargained for cash and the cancellation of notes held against her, which were the equivalent of cash; and this is a very different thing from a vendor's lien, if that be her right. This, instead of showing an executed agreement, tenders to her a means through litigation with her vendees for the enforcement of unperformed stipulations.

But if it be conceded that the transfer was complete, so as to vest the title in the grantees in the deed, and to convert her interest in the lands to that of mortgagee, the case is not one in which subrogation can be claimed. It is not a case where the insurer reserves in the provisions of his policy the right to an assignment of the mortgage upon payment of a loss, as in *Foster v. Van Reed*, 70 N.

Y. 19. There the right resting upon express contract cannot be defeated or impaired by any private arrangement between the assured and the owner of the equity of redemption. Nor is it of that class of cases where a mortgagee insures his mortgage interest "at his own expense, upon his own motion, and for his sole benefit." In such cases, says Judge Folger, in *Excelsior Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 359, "the insurer, in making compensation, is entitled to an assignment of the rights of the assured." The remarks made by the learned chancellor in *Sussex Ins. Co. v. Woodruff*, 2 Dutch. 541, were in respect to insurance of a like interest by the mortgagee without the knowledge or concurrence of the mortgagor. Under a contract of insurance made by a mortgagee, entirely on his own behalf and at his own expense, for indemnity against loss by destruction of the pledge, the owner of the equity of redemption can have no interest, and payment of the loss does not go in satisfaction of the debt. Subrogation can in such case harm no one. And without it the mortgagee might collect his debt twice. The right does not rest on the relation of suretyship. Mr. Justice Bradley says, "Where a creditor effects insurance on property mortgaged or pledged to him as security for the payment of his debt, the insurers do not become sureties of the debt, nor do they acquire all the rights of sureties. They are insurers of a particular building only." *Insurance Co. v. Stinson*, 103 U. S. 25. If such were the true character of the insurer, it would place serious impediments in the way of contracts between mortgagor and mortgagee, in respect to insurance of the mortgaged premises, which are held to be entirely legitimate. The ordinary insurance clause in mortgages may be mentioned as an instance. A more reasonable ground for subrogation in these cases lies in the fact that insurance by the mortgagee, such as gives the debtor no benefit of money recovered on a loss, would, without subrogation, convert what is designed as a contract of indemnity into a wager policy. The mortgagee could demand payment of the loss to the extent of his mortgage without reducing the mortgage debt. Public policy condemns such contracts.

But there is neither reason nor good policy in compelling a mortgagee to assign his security where, through an arrangement between the mortgagor and mortgagee, insurance on the mortgaged premises is effected for their common benefit, although the policy be taken in the name of the mortgagee. Where a policy is so taken out, under the insurance clause in a mortgage, payment of a loss to the mortgagee inures to the benefit of the mortgagor, and it is immaterial under such stipulation in whose name the policy be procured.

Waring v. Loder, 53 N. Y. 581, and cases cited. A policy effected under such an agreement, in the name of the mortgagee, to secure the mortgaged premises against loss by fire will protect the mortgagor, and payment to the mortgagee, *pro tanto*, discharges the debt. Such an agreement between the mortgagor and mortgagee is not regarded as any infringement upon the rights of the underwriters. The mortgagee becomes bound to give the credit to his mortgage debtor. His right is not to withhold it, and subrogation is only to such rights as he has. In *Sheldon on Sub.*, § 235, it is said: "If the mortgagee has procured the insurance, though in his own name, at the request and expense and for the benefit of the mortgagor, as well as for his own protection, though this is by a parol agreement unknown to the insurers, the mortgagor will have the right, in case of loss, to have the avails of the policy applied for his relief towards the discharge of his indebtedness." This statement of the rule is well supported by numerous cases cited by the author. *Kernochan v. Bowery Ins. Co.*, 17 N. Y. 428; *Hay v. Star Ins. Co.*, 77 N. Y. 235, and *Clinton v. Hope Ins. Co.*, 45 N. Y. 454, fully support the rule as stated in the text. In *Clinton v. Hope Ins. Co.*, just cited, it was applied to a state of facts in close similarity with the present case. The owner of the property had taken out a policy on buildings and personalty contained therein, and while it was running agreed to convey the property to a vendee, who paid part of the purchase-money. The vendor agreed to hold the policy for their mutual benefit, the vendee agreeing to return the vendor the unearned portion of the premium on the policy. The case, in one of its aspects, was considered by the court in the light of an executed sale, and the court denied the right of the insurer to subrogation to the vendor's claim for balance of purchase-money, because of the agreement in the contract of sale to hold the policy for their mutual benefit. The court say: "If, as between the parties to the contract of sale, the vendee was entitled to the benefit of the insurance moneys in case of loss, the defendant, the company, can assert no equity in hostility to that arrangement. The equity of the defendant is the equity of the vendors, and an arrangement between the vendors and vendee in respect to the application of the proceeds of the insurance did not violate any contract between the insurer and the insured. The defendant, on payment of the indemnity promised, simply performs his contract." The rule above exemplified has the support of authority and is, as I think, based upon good reason and sound policy. The principle is not that the right of substitution arises where the underwriter pays loss on a policy of insurance effected by a mortgagee upon the mortgaged

premises. The insurance contract imports no such equity in the insurer. If it be awarded to him, it is entirely in virtue of some train of circumstances that render the claim an equitable one.

The contract with Mrs. Nelson on the part of the company was an indemnity against loss in the destruction of the buildings for which the usual premium and obligation required by the company for such insurance was demanded and received. On this policy, unchanged in its terms, the loss was paid. Now, the respondent claims a different *status* from that assumed in its contract, and claims its liability to be of a different nature, because of the new attitude which the insured assumed through her contract to sell. Yielding that to the respondent certainly it must take its new position, not upon a partial view or selected part of her contract. When it puts itself on her agreement, it does and must accept it as a whole, because her rights under that agreement, and those of her vendees, are to be determined on the entire terms of it. Among these, she engaged to hold her policy for the joint protection of herself and her vendees, and the latter assumed to pay all subsequent assessments upon it. She cannot, under her contract with him, refuse to allow the proceeds of the insurance to reduce, *pro tanto*, her claim against them, and her rights in this regard are the respondent's rights.

For these reasons the decree below should be reversed, and the bill be ordered dismissed, with costs.

Decree unanimously reversed.

SUFFOLK FIRE INSURANCE CO. AND ANOTHER v. BOYDEN.

9 ALLEN, 123. — 1864.

BILL IN EQUITY setting forth that the Suffolk Fire Insurance Company and the Dorchester Fire Insurance Company insured a building and the machinery in it, situated in Worcester, from May 1st, 1863 to May 1st, 1864; that the premiums were paid by the defendant, who was the mortgagee in possession, and so described in the policies; that the premises insured were destroyed by fire during the continuance of said policies; that the plaintiffs have offered to pay said loss to the defendant, and also the amount due on the mortgage above the loss, if any, and have requested the defendant upon such payment to assign the mortgage to them, or to hold the same for their benefit, which he has refused to do. The prayer of the bill was for an answer, an account of the rents and profits and

the loss, that a trust might be decreed in favor of the plaintiffs as to said mortgage, that they might be subrogated to the rights and remedies of the defendant under the same, for an assignment and for further relief. The policies were annexed to the bill, and each of them contained the following provision: "And whenever this company shall pay any loss, the assured agrees to assign over all his rights to recover satisfaction therefor from any other person or persons, town or other corporations." The answer of the defendant admitted the mortgage, the possession, the insurance and the loss, as stated in the bill; alleged, with other facts not now material, that the policies were made for his benefit as mortgagee and not for the mortgagor; that his loss, and also the amount due on the mortgage, exceeded the insurance, and denied the right of the plaintiffs to an account or to have the mortgage assigned to them. The case was heard upon the bill and answer, and reserved by Chapman, J., for the consideration of the whole court.

HOAR, J. — The only distinctions that are suggested between the case at bar and *King v. State Ins. Co.*, 7 Cush. 1, are these: 1. That this is a suit in equity, and that was a suit at law; 2. That here the insurance is expressly made upon the interest of the assured as mortgagee, while there it was upon his interest in the property, which was only that of a mortgagee, without disclosing its precise character; and 3. That the decision of the question upon which this case depends was not necessary to the judgment rendered in the other.

We do not think it expedient or desirable to revise the case of *King v. State Ins. Co.*, or to restate the argument so fully presented by the late chief justice in giving the opinion of the court. That case was very fully considered; and although it has been subjected to some adverse criticism, we find no reason for dissatisfaction with its principles or conclusions. On the contrary, the objections which have been urged against it seem to us to rest upon misapprehension, and we think that the doctrines there stated are and ought to be the settled law of this commonwealth.¹

It was decided upon the ground that an insurance by a mortgagee of his interest in the mortgaged property is not an insurance of the debt, although the amount of the debt is the measure of his insurable interest in the property. There is no privity of contract between the insurer and the mortgagor, but each has a contract with the mortgagee separate and independent from the other. The

¹ The present opinion gives the salient points of Chief Justice Shaw's opinion in *King v. Ins. Co.*, 7 Cush. 1.

mortgagee cannot charge to the mortgagor the premiums which he pays for insurance; and it is conceded that, *e converso*, the mortgagor can derive no benefit from the insurance in case of loss. *White v. Brown*, 2 Cush. 416. But why should not the mortgagor have the benefit of the insurance? The equitable argument in his favor would seem to be at least as strong as that in favor of allowing the insurer the advantage of a subrogation of the debt. The whole interest of the mortgagee in the property, in its inception, and while it continues, is only for the purpose of indemnity. He takes it as a security from which he may recover what is due to him, if the debt is not paid. If the insurer pays a loss by fire, equal to the whole debt, the mortgagee receives, through his title to the property held as a security, the amount of his debt, excepting only the premium paid, which may be a very trifling proportion of it. The mortgagor has lost the same amount. Why should not the mortgagor pay the premium, and be entitled to treat the debt as cancelled? The sufficient answer is, because the insurance is a wholly collateral contract, which the law allows the mortgagee to make, and with the result of which the mortgagor has no concern. The whole consideration proceeds from the mortgagee. If there is no loss by fire, he loses the whole amount of premiums paid, without any claim upon the mortgagor for compensation. The premiums paid are intended to be a just equivalent for the sum to be received on the happening of the contingent event. The larger sum to be received if the event happens, is fixed in a just proportion to the chances that it will not happen, and that the premium will have been paid without any return. It would be manifestly unjust that the mortgagor should have the advantage of an indemnity, when he has borne no part of the expense of obtaining it.

On the other hand, the insurer has received a full equivalent for the loss which he is called on to pay. Why should he receive his premium, and subject the mortgagee to the loss of it if no fire occurs, giving him no corresponding advantage in case a fire happens? The debt, as between the insurer and the mortgagee, is as purely a collateral contract as is the insurance when considered in relation to the mortgagee and mortgagor. It is urged that insurance is a contract of indemnity. But what is an indemnity must be determined by a correct application of the word to the subject matter. The insurance is against a loss by fire of property in which the insured has, at the time of the insurance and at the time the loss happens, an insurable interest. If the insurer pays no more than the value of the property destroyed, no more than the sum insured upon it, and no more than the interest of the insured at the

time of the loss, he pays no more than an indemnity under his contract. That the loss may, by means of other contracts of a collateral character, or indirectly, give the insured an advantage, is of no consequence. Could there be a more exact indemnity in any case of loss by fire, than if the insurer should replace the property burned, when its value does not exceed the sum insured, nor the insurable interest of the holder of the policy? Yet what claim would the insurer who should rebuild have to an assignment to him of the mortgage debt? Again, there are incidents to a mortgagee's estate, which may give him, as the proceeds of his mortgage, a larger value than his mere debt. He may foreclose his mortgage, and thus acquire an absolute title to property of a far greater value than the amount due him.

But, without extending the discussion, it is sufficient to say, that the doctrine which we now reaffirm was one of the grounds upon which the decision in *King v. State Ins. Co.* was expressly made to rest; that the conclusion, that the insurer has no interest in the mortgage debt, is as decisive against his claim in equity as at law; and that if the title of the insured was that of a mortgagee, it is immaterial whether it was insured *eo nomine* or otherwise. The agreement in the policies, that in case of the payment of a loss the insured will assign to the insurers "all his rights to recover satisfaction therefor from any other person or corporation," does not affect this case, because the mortgage debt is not in any sense a right to recover satisfaction for the loss by fire.

Bill dismissed with costs.

BRADLEY, J., IN *INSURANCE CO. v. STINSON*.

103 U. S. 25, 26. — 1880.

THIS was an action on a policy of insurance against loss or damage by fire. Stinson, the plaintiff below, had a contract to build a hotel, to be called the Webster House, at Marshfield, Plymouth County, Massachusetts, for the sum of \$25,000, and had nearly completed it; but, failing to get his payments from the owner, he stopped work and took the necessary steps for securing a mechanic's lien on the building. For this purpose he filed the required statement with the town clerk, and commenced an action to enforce his lien within the period prescribed by law. Whilst that action was pending, in July, 1875, he procured the policy in question from the plaintiffs in error, the defendants below, insuring him for three months against

loss or damage by fire to the amount of \$5,000 on the building — the policy stating his interest to be that of contractor and builder. The loss occurred during the continuance of the policy, and due notice was given. After the fire the plaintiff did not further prosecute his action to enforce the lien, but commenced the present action for the amount of his insurance. When the building contract was entered into, and until the loss occurred, the property on which the building was erected was subject to a mortgage for a debt of \$17,000, being the purchase-money which the owner had agreed to pay to the former owner, and which is conceded to have been a lien on the whole property prior to that of the plaintiff. Two defenses were made by the insurance company to the action: First, the failure of the plaintiff to prosecute his suit for enforcing his lien. * * *¹ The court overruled these defenses, and charged the jury substantially as follows, namely: That if the plaintiff had a valid builder's lien when the policy was effected, which could have been enforced by the decree of the appropriate court against the equity of redemption of the property, and if it was a valid and subsisting lien at the time of the loss, it was immaterial whether he did or did not subsequently perform those acts, the non-performance of which as conditions subsequent might have dissolved the lien. * * * To this charge and to the refusal to give instructions to the contrary the defendants took a bill of exceptions.

We think that the instructions were correct. As to the first point, based on the abandonment by the plaintiff, after the destruction of the building, of the proceedings to enforce his lien, it is apparent from the evidence adduced by the defendants themselves that it could not have injured them. But, aside from this consideration, if the plaintiff had an insurable interest at the time of issuing the policy and at the time of the loss, equal to the amount insured, he had a complete and absolute cause of action against the defendants; and it was no concern of theirs whether he farther prosecuted his lien or not, unless they desired to be subrogated to his rights and gave him notice to that effect. Whether, if they had done this, and had offered to indemnify him against all costs and expenses, a refusal on his part to continue the proceedings would have been a defense to this action, it is unnecessary to inquire. No such course was taken by the defendants. We may remark, however, that where a creditor effects insurance on property mortgaged or pledged to him as security for the payment of his debt, the insurers do not become sureties of the debt, nor do they acquire all the rights of

¹ The omitted parts of the opinion deal with insurable interest.

such sureties. They are insurers of the particular property only, and so long as that property is liable for the debt, so long its destruction by fire would be a loss to the creditor within the terms of the policy. A surety of the debt might complain if the creditor should surrender to the debtor collateral securities; but an insurer of property for the benefit of the mortgagee would have no just ground of complaint. True, after a loss has occurred and the insurance has been paid, sufficient to discharge the debt, the insurers may be entitled to be subrogated to the rights of the creditor against the debtor, and to any collateral securities which the creditor may then hold and which are primarily liable for the debt before the insurers. But even then we do not think that the creditor is bound to take any active steps to realize the fruits of a collateral, or to keep it from expiring, unless the insurance be first paid and notice be given to him of a desire on the part of the insurers to be subrogated to his rights, with a tender of indemnity against expenses. We are aware that views somewhat differing from these have been held by respectable authority, but we think without any sound reason. See May on Insurance, § 457; *Insurance Company v. Woodruff*, 2 Dutch. (N. J.) 541. To impose such restrictions and obligations upon the creditor would be to add to the contract of insurance conditions never contemplated by the parties making of it a mere shadow of security, and increasing the avenues of escape from obligation to pay, already too numerous and oppressive. When a building is insured in the interest of a mortgagee, the insurance company does not inquire what other collaterals he holds, and never reduces its premium on any such consideration.

PHENIX INSURANCE CO. *v.* FIRST NATIONAL BANK.

85 VA. 765. — 1889.

APPEAL from decree of the Circuit Court of Rockingham County, rendered June 30th, 1887, in the chancery cause therein pending, in which the Phenix Insurance Company of New York, the Fire Association of Philadelphia, and the Hope Insurance Company of New Orleans were complainants, and the First National Bank of Harrisonburg, Virginia, was defendant.

A corporation, styled the New Rawley Springs Company, issued its bonds to the amount of \$30,000, dated July 12th, 1879, with coupons for semi-annual interest, and executed a trust deed to secure payment thereof. These bonds, to the amount of \$7,187, were,

on the 10th of August, 1885, owned by the defendant bank, and that day the bank obtained from the Phenix Insurance Company a policy of insurance against loss by fire to the amount of \$1,000 for the term of one year, on part of the buildings and furniture embraced in the trust deed. The policy was issued in the name of the Springs Company, though the bank paid the premium, the loss, if any, being payable to the bank as its interest might appear. On the 7th of June, 1886, the items of property, covered by the policy, were destroyed by fire, the loss aggregating \$700, which was paid and the policy surrendered. The bank also took out additional policies in the Virginia Fire and Marine Insurance Company for \$2,750; in the Hope Insurance Company of New Orleans for \$1,500, and in the Fire Association of Philadelphia for \$1,750, making a total insurance of \$7,000 to protect the bonds. The losses under the several policies were: Phenix, \$700; Fire Association, \$1,375; Hope, \$1,050; and Virginia Fire and Marine, \$2,375, aggregating \$5,500. When the Phenix Insurance Company paid the bank the amount of the loss under its policy, it demanded of the bank \$700 of said bonds, claiming that it stood in the relation of surety, and that having paid \$700 of the debt of the Springs Company represented by the bonds, it had become entitled, on the principle of subrogation, to bonds to that amount. This claim being denied by the bank, the Phenix Insurance Company filed its bill for relief. The bank demurred to and answered the bill, denying the complainant's demand. Then the Fire Association and the Hope Insurance Company, by leave of the court, filed their petition to the same effect. These two companies had not paid the losses under their policies, declining to do so until the bonds they claimed were turned over to them.

The court decreed that the complainants were not entitled to demand and take of the bank the bonds, or any of them, until the bank had received the full amount of the principal and interest of its debt; but that the insurance companies which have or shall have paid the bank the amount of adjusted loss due from them respectively were entitled in equitable proportions to such surplus of the dividends applicable to said bonds owned by the bank as may arise upon the foreclosure of the trust deed and remain after the payment of principal and interest of said bonds to the bank, and that the prayer of the complainants be denied, and that the right of the bank to hold and collect the bonds was firm and stable. From this decree the Phenix Insurance Company and the other complainants appealed to this court.

RICHARDSON, J. — We have had no hesitancy in coming to the conclusion that the decree complained of is without error, either

on principle or authority. The case involves only one single question: Does an insurer, who has paid a loss to a mortgagee that covers only a part of the mortgage debt, acquire as against the mortgagee a right to demand and take from the mortgagee the evidences of the debt secured to the amount of the loss paid by the insurer, whether the mortgagee be able or not to obtain satisfaction of his debt from the remaining evidences of the debt? Or, in other words, must not the creditor's debt be paid *in full* before the insurer can take from him by subrogation any part of that debt?

The doctrine which is applicable to this case, and which squarely meets this question, is clearly laid down by Mr. Justice Story in pronouncing the opinion of the Supreme Court of the United States in *Carpenter v. The Providence Washington Insurance Co.*, 16th Peters, 501, where the learned judge says: "No doubt can exist that the mortgagor and the mortgagee may each separately insure his own distinct interest in the property. But there is this important distinction between the cases, that where the mortgagee insures solely on his own account it is but an insurance on his debt; and if his debt is afterwards paid or extinguished, the policy ceases from that time to have any operation; and even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby; neither can the mortgagor take advantage of the policy, for he has no interest whatever therein. On the other hand, if the premises are destroyed by fire before any payment or extinguishment of the mortgage, the underwriters are bound to *pay the amount of the debt to the mortgagee*, if it does not exceed the insurance. But then upon such payment the underwriters are entitled to an assignment of the debt from the mortgagee, and may recover the same amount from the mortgagor, either at law or in equity, according to circumstances." And in *Insurance Co. v. Stinson*, 103 U. S. 25, Mr. Justice Bradley concludes the opinion with the remark: "After a loss has occurred and the insurance has been paid *sufficient to discharge the debt*, the insurer may be subrogated to the rights of the creditor against the debtor." In a note to *King v. State M. Fire Insurance Co.*, 54 Am. Dec. 696, the learned annotator says: "The doctrine of the principal case that the insurer is not entitled to demand subrogation under a policy which does not expressly provide for it is the established law in Massachusetts, * * * and that doctrine seems to be adopted in May on Ins., § 456; Wood on Fire Ins., 782, and in later editions of Mr. Phillips' work. 2 Phil. on Ins., § 1712. But it must be admitted that the decided preponderance of authority is against this doctrine and in favor of the insurer's right of subroga-

tion and assignment in such cases upon paying the loss, *and, if necessary, the balance due on the mortgage.*" Citing Flanders on Ins., 400; 16 Peters, 495, and numerous other authorities.

The authorities demonstrate the correctness of the decree appealed from, and we are therefore of opinion that the same must be affirmed.

Decree affirmed.

6. PROCEDURE.

LORD, J., IN HOME MUT. INS. CO. *v.* OREGON R'Y & NAV. CO.

20 ORE. 569, 573. — 1891.

WHERE the insurance company has paid the owner for the destruction of his property by fire occasioned by the fault of a railroad company and afterwards the owner receives the amount from the company in satisfaction of his damages, he holds it in trust for the insurance company, and it may recover it from him by a suit in equity. So, too, if the railroad company has not paid the owner his damages for the loss, or has paid it to him, knowing that he had received the amount of the insurance from the insurance company, the railroad company is liable to the insurance company in an action at law, which it has a right to bring in the name of the owner, without his consent, to repay it the damages to the amount of the sum paid by it, and that a release from the owner would be no defense to such an action. *Monmouth, etc., Ins. Co. v. Hutchinson, etc., Transp. Co.*, 21 N. J. Eq. 108. The subrogation of the insurer to the remedies of the insured for the destruction of the insured property upon the payment of the loss operates as an equitable assignment to the insurer to the extent of the amount paid. "It is in the nature," said Shaw, C. J., "of an equitable assignment, which authorizes the assignee to sue in the name of the assignor for his own benefit." *Hart v. Railroad Corp.*, *supra* [13 Met. 99].

It results, then, that the right, resting on the doctrine of subrogation and not depending upon contract or privity, must be worked out through the right of the insured or the owner of the property destroyed; that the remedy must be prosecuted in his name, unless the Code of Procedure, which permits an action to be brought in the name of the real party in interest, has changed this rule. The case of *Connecticut Fire Ins. Co. v. Erie Ry. Co.*, 73 N. Y. 399, is relied upon to support this position. But in that case the owner had fully settled his claim against the railroad company, but the contract showed that

the amount of the policy was deducted from the amount of the loss in the settlement, so that the insurance company was the only remaining party in interest. The action being under the code of that State, which requires the action to be brought in the name of the real party in interest, by this settlement, the owner having no interest, it was held that the insurance company might properly bring the action. In *Etna Ins. Co. v. Hannibal, etc., Ry. Co.*, 3 Dill. 1, it was held by Dillon, J., that, in a case where the property destroyed exceeded in value the amount insured, the rule of law had long been settled that the insurance company, on payment of the loss, cannot sue the wrongdoer in its own name, saying: "The suit, though for the use of the insurer, must be in the name of the person whose property was destroyed. The wrongful act was single and indivisible, and gave rise to but one liability. If one insurer may sue, then, if there are a dozen, each may sue, and, if the aggregate amount of all the policies falls short of the actual loss, the owner could sue for the balance. This is not permitted, and so it was held nearly a hundred years ago." And again: "But it is insisted that the provisions of the Missouri statute that every action shall be prosecuted in the name of the real party in interest, though it declares that the provision shall not authorize the assignment of a thing in action not arising out of contract, changes the rule. However it might be if the amount paid by the insurer to the assured had equaled or exceeded the value of the property, and the assured had made a full assignment, it is plain that this case falls within the reasons of the rule itself as expounded by Buller and Mansfield in the Case in Douglas [*Mason v. Sainsbury*, 3 Doug. 53], above cited, and which is the foundation of the law on this subject."

In *Marine Ins. Co. v. St. Louis, etc., Ry. Co.*, 41 Fed. Rep. 644, it was held, under the Arkansas statute providing that "every action must be prosecuted in the name of the real party in interest," that an insurance company which has paid the insured the full value of the property destroyed may maintain an action in its own name against the wrongdoer causing the loss. Caldwell, J., said: "Under the reformed Codes of Procedure, the action of the insurance company, in cases of this sort, may be brought in the name of the insurer [citing *Swarthout v. Railway Co.*, 49 Wis. 625, 6 N. W. Rep. 314; *Connecticut Fire Ins. Co. v. Erie Ry. Co.*, 73 N. Y. 399]. But, as it is alleged in the complaint that the plaintiff has paid the insured the full value of the property destroyed, it is plain that the latter have no interest in the present controversy, and hence they are not necessary parties." The opinion is, however, expressed in that

case, if the value of the property destroyed exceeds the insurance money paid, that the insurer might join or be joined with the owner in the action to recover for its loss, and would not be required, as held by Judge Dillon, *supra*, in such case, to prosecute the action in the name of the insured. A like view was sustained in *Crandall v. Transportation Co.*, 16 Fed. Rep. 75, where Dyer, J., held that in an action to recover the value of a building destroyed by a fire caused by the alleged negligence of the defendant, the owner of the building and an insurance company that has paid the amount of the insurance of such building, and taken an assignment of the claim from the owner to that extent, may join as parties to the action when the value of the house exceeds the amount for which it was insured. In *Swarthout v. Railway Co.*, several insurance companies united with Swarthout, to whom they had paid the amount of their policies for property destroyed by the negligence of the defendant, in an action to recover for the value of such property. The defendant demurred on the ground that the plaintiffs could not sue in one action, but each must sue separately. The demurrer was overruled, and the correctness of this ruling was the subject of the controversy. The court say: "It is said, if the defendant is liable at all, it is separately and distinctly liable to each insurance company to the amount paid on its policy. But it seems to us that it would be an intolerable rule to allow each insurance company to bring a separate suit. The railroad company might well say, were this attempted: 'The claim is indivisible. There is but one wrongful act complained of, one loss, and one liability.' It might well insist that the whole matter should be litigated in one action. And what objection there can be to allowing the owner to unite with the insurance companies in bringing one action to determine the liability of the defendant, we fail to perceive. Under the old practice the action would probably have been brought in the name of the assured for the benefit of all concerned; but the Code requires the action to be brought in the name of the real party in interest. Now, it appears that Swarthout has made an assignment in writing to each insurance company of a part of his claim against the railroad company for the alleged wrongful destruction of his property. It is obvious, if one of the insurance companies may bring a separate suit for the amount of its claim, each may; and, as the aggregate amount of the policies falls short of the actual loss, Swarthout may sue for the balance. As we have said, a rule of law which would allow this to be done would operate most oppressively upon the railroad companies. For a single wrongful act, which gave rise to but one liability, it might be harassed with a dozen different actions." In a later case (*Pratt*

v. *Radford*, 52 Wis. 118, 8 N. W. Rep. 606), the court, after citing the section of their statute which provides that "every action must be prosecuted in the name of the real party in interest," and the further section, that, "of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but, if the consent of any one who should be joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint," says: "Under the statutes above cited the insurance companies could maintain an action against such wrongdoer in their own names, or be joined with the insured as plaintiff in such action. * * * Where the common law procedure prevails, the action of the insurance companies would necessarily be brought in the name of the insured. It could be so brought without his consent, and he would have no control over it. But under our Code of Procedure the companies would sue in their own names, joining the insured as plaintiff or making him defendant, according to the exigencies of the case."

It would appear, then, from these last cases, that where the property is insured for less than its value, and is destroyed by the negligence of a third party, the insurance companies, who have paid the owner the insurance money, must be joined with him in an action to recover damages for the destruction of such property, and that, upon a refusal of such parties to join as plaintiffs, they must be made defendants. The action, though, would be brought in their own name, joining the insured as plaintiff or making him defendant, according as he stood related to the facts. From all this the conclusion results that, where the wrongful act is single and indivisible, there can be but one liability or cause of action. Since the Code the cause of action remains as before, single and indivisible; and the insurer acquires only a right or interest with the owner of the property in the cause of action or liability, and not a new and separate cause of action. He cannot, therefore, sue in his own name alone, in any case, under the Code, except where the amount paid by him has exceeded or equaled the value of the property destroyed, and no interest remains in the owner. When the amount of the insurance money paid is less than the value of the property destroyed by the negligent act, all the authorities agree that the insurer must either sue in the name of the insured or join with him in bringing an action against the wrongdoer. None allows that in such case he can sue in his own name alone, for the reason that the wrongful act is single and indivisible, and gives rise to but one liability or cause of action. In that cause of action he acquires a joint right with the owner therein, and not a new and separate right of action, and

therefore must prosecute it jointly with him. They have a joint interest in a single liability, and, united, are the real parties in interest. Now, the facts disclosed by this record concede that the property destroyed by the wrongful act of the defendant greatly exceeded in value the amount of the insurance money paid by the plaintiff. To the extent of that payment the plaintiff became subrogated to the right of the owner in the property, but the cause of action remained single and indivisible, and the plaintiff acquired only a joint right with the owner therein, and not a new and independent right of action, and could not, therefore, prosecute the action in his own and separate right. Yet this is exactly what the plaintiff has done, and claims it has a right to do. If this were so, it would establish an intolerable rule, and expose the defendant to be harassed by a dozen different actions, which it seems to us would be contrary to legal principles, and be productive of mischief and oppression. The judgment must be affirmed.

b. Life and Accident Insurance.

INSURANCE CO. *v.* BRAME.

95 U. S. 754. — 1877.

ACTION by the Mobile Life Insurance Company against Brame to recover \$7,000. The plaintiff had insured the life of McLemore. Brame wilfully shot and killed McLemore. The plaintiff sues Brame to recover as damages the amount of the policies, which amount the plaintiff acknowledges to be due and a part of which has been paid. Judgment for defendant.

MR. JUSTICE HUNT. — The argument of the insurance company is that the killing of the deceased was an injury to or violation of a legal right or interest of the company; that, as a consequence thereof, it sustained a loss, which is the proximate effect of the injury. The answer of the defendant is founded upon the theory that the loss is the remote and indirect result merely of the act charged, that at the common law no civil action lies for an injury which results in the death of the party injured, and that the statutes of Louisiana upon that subject do not include the present case. The authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the

English courts and in many of the State courts, and no deliberate, well-considered decision to the contrary is to be found. In Hilliard on Torts, p. 87, sec. 10, the rule is thus laid down: "Upon a similar ground it has been held that at common law the death of a human being, though clearly involving pecuniary loss, is not the ground of an action for damages." The most of the cases upon the subject are there referred to. *Baker v. Bolton et al.*, 1 Camp. 493; *Connecticut Mutual Life Insurance Co. v. New York & New Haven Railroad Co.*, 25 Conn. 265; *Kramer v. Market Street Railroad Co.*, 25 Cal. 434; *Indianapolis, Pittsburg & Cleveland Railroad Co. v. Kealey*, 23 Ind. 133; *Hyatt v. Adams*, 16 Mich. 180; *Shields v. Yonge*, 15 Ga. 349; *Peoria Marine & Fire Ins. Co. v. Frost*, 37 Ill. 333. The only cases that tend to the contrary of this rule, so far as we know, are *Cross v. Guthery*, 2 Root (Conn.) 90, *Plummer v. Webb*, Ware, 69, and *Ford v. Monroe*, 20 Wend. (N. Y.) 210. They are considered by the New York Court of Appeals in *Green v. The Hudson River Railroad Co.*, 2 Keyes (N. Y.) 294, and compared with the many cases to the contrary, and are held not to diminish the force of the rule as above stated. In that case, the plaintiff alleged that, on the ninth day of January, 1856, his wife was a passenger on the defendant's road, and by the gross carelessness and unskilfulness of the defendants a collision occurred, by means of which his wife was killed, "whereby he has lost and been deprived of all the comfort, benefit, and assistance of his said wife in his domestic affairs, which he might and otherwise would have had, to his damage," etc. A demurrer to this complaint, upon the ground that the facts alleged constituted no cause of action, was sustained by the New York Court of Appeals. In *Hugh v. New Orleans & Carrollton Railroad Co.*, 6 La. Ann. 495, the same principle was decided, and in the same manner. In giving its opinion, the court say: "The exception of the defendants presents the question whether the death of a human being can be the ground of an action for damages." Not being satisfied with this decision, Messrs. Ogden & Duncan asked for a rehearing, the argument for which is reported in the same volume, pp. 498-508. It was denied in an elaborate opinion delivered by Chief Justice Eustis. In *Hermann v. Carrollton Railroad Co.*, 11 Id. 5, this principle was again affirmed in an opinion by Chief Justice Merrick.

It is only necessary to refer to one other case, involving the same principle as those already cited, but in its facts more closely resembling the case under consideration. In *Connecticut Mutual Life Insurance Co. v. New York & New Haven Railroad Co.*, *supra*, the declaration alleged that on the twentieth day of March, 1850, the plaintiffs

had outstanding and in force a policy of insurance for \$2,000 upon the life of Samuel Beach; that Beach was on that day a passenger on the defendants' road; that the defendants so carelessly, negligently, and unskilfully conducted themselves that the train on which Beach was riding was thrown down a bank into the river; that Beach was greatly wounded and bruised, by means whereof he then and there died, by reason of which the plaintiffs were compelled to pay to his administrators the sum of \$2,000 upon the said policy.

The allegation of the present plaintiffs is that Brame tortiously and illegally took the life of McLemore by shooting him. This is open to the inference that the act of Brame was felonious. The case in Connecticut is based upon the allegation of negligence and carelessness, and is the more favorable to a recovery, in that it avoids the suggestion existing in the present case, that the civil injury is merged in the felony. The Supreme Court of Connecticut held that the action could not be sustained. We have cited and given references to the important cases on this question; they are substantially uniform against the right of recovery.

Upon principle, we think, no other conclusion could be reached than that stated. The relation between the insurance company and McLemore, the deceased, was created by a contract between them, to which Brame was not a party. The injury inflicted by him was upon McLemore, against his personal rights; that it happened to injure the plaintiff was an incidental circumstance, a remote and indirect result, not necessarily or legitimately resulting from the act of killing. As in *Rockingham Insurance Co. v. Mosher*, 39 Me. 253, where an insurance company brought a suit against one who had wilfully fired a store upon which it had a policy of insurance, which it was thereby compelled to pay, it was held that the loss was remote and indirect, and that the action could not be sustained. In *Ashley et al. v. Dixon*, 48 N. Y. 430, it was held that if A. is under a contract to convey his land to B., and C. persuades him not to do so, no action lies by B. against C. So a witness is not liable for evidence given by him in a suit, although false, by which another is injured. *Grove v. Brandenburg*, 7 Blackf. (Ind.) 234; *Dunlap v. Gledden*, 31 Me. 435. And in *Anthony v. Slaid*, 11 Metc. (Mass.) 290, a contractor for the support of town paupers had been subjected to extra expense in consequence of personal injury inflicted upon one of them; and he brought the action against the assailant to recover for such expenditure. The court held the damage to be remote and indirect, and not sustained by means of any natural or legal relation between the plaintiff and the party injured, but simply by means of a special contract between the plaintiff and the

town. Some text-writers are referred to as holding a different view, but we are not cited to any case in this country or Great Britain where a different doctrine has been held.

By the common law, actions for injuries to the person abate by death, and cannot be revived or maintained by the executor or the heir. By the act of Parliament of Aug. 21, 1846, 9 & 10 Vict., an action in certain cases is given to the representatives of the deceased. This principle, in various forms and with various limitations, has been incorporated into the statutes of many of our States, and among others into that of Louisiana. It is there given in favor of the minor children and widow of the deceased, and, in default of these relatives, in favor of the surviving father and mother. Acts of La., 1855, pr. 223, p. 270. The case of a creditor, much less a remote claimant like the plaintiff, is not within the statute. In each of the briefs it is stated that the defendant was tried for the homicide, and acquitted. In the view we take of the case, the fact of a trial or its result is a circumstance quite immaterial to the present question, however important it may have been to the defendant.

Judgment affirmed.¹

¹ In *Harding v. Town of Townshend*, 43 Vt. 536, which was an action for damages for personal injuries occasioned by a defective highway, the defendant attempted to have allowed in mitigation of damages, the amount received by the plaintiff upon an accident policy, on account of the same injuries. The court said: "If there is any such connection between these two remedies as to have the enforcement of one operate in defense or mitigation of the other, it is the insurer and not the town that should be entitled to this benefit. It would seem to be a perversion of justice, to subrogate the wrongdoer who has caused the loss, to the rights of the injured party as to his remedy against the insurer."

INDEX.

	PAGE.		PAGE.
Abandonment	236	Beneficiaries	
Accident insurance		fire insurance	336
burden of proof	315	life insurance	359
nature of contract	15	nature of interest	362
subrogation	585	who may be	359
terms	270	mutual benefit insurance	381
Accident, what is	270	right to sue	380
Action		Binding slip	100
limitation	211	Breach of contract by insurer	410
when accrues	314	Broker	500
adjuster	501	Burden of proof	
Age	248	accident insurance	315
Agents	468	representations and warranties	124
adjuster	501	Carriers, subrogation	553
broker	500	Cause, <i>See</i> PROXIMATE CAUSE.	
concealment by	106	Chattel mortgage as incumbrance	160
duty to principal	532	Collision	231
for insured or insurer	426, 517	Concealment	104
local	468	Consideration	
scope of authority	468	for insurance	92
<i>See also</i> WAIVER AND ESTOPPEL.		for waiver	422, 445, 454
soliciting	470	Construction of contract	131
sub-agents	503	Consummation of contract	93
Alienation	155	Contribution	198
Alterations	173	Corporations, as insurers	31
Apportionment of loss	205	<i>See also</i> STOCKHOLDER.	
Arbitration	194	Creditor	
Assignment		assignment of life policy to	66
of fire policy to mortgagee	396	insurable interest in life	60
of fire policy to purchaser	389	insurable interest in property	38
of life policy	402	life insurance by insolvent	
of life policy to creditor	66	debtor	375
of marine policy	401	Crime, death or accident while	
Attachment of risk, marine	217	committing	301
Aunt and niece, insurable interest	56	Damages, for breach by insurer	414
Average		Dangerous articles	162
general	232	Debtor, <i>See</i> CREDITOR.	
particular	241		
Bailee, insurable interest	49		

	PAGE.		PAGE.
Delivery of policy, <i>See</i> CONSUMMATION.		Infants, capacity	22
Deviation	220	Inhaling gas, death by	290
Disability, total	310	Injury, external	277
Divisibility of loss	205	Insanity and suicide	263
		Insurable interest	
Estoppel, <i>See</i> WAIVER.		aunt and niece	56
Examination of insured	190	bailee	49
Execution, as alienation	157	creditor	38, 60
Explosion, loss by	182	husband in wife's property	46
Exposure, voluntary	284	in life	50
External injury	277	in life of another	53
		in one's own life	50
Falling building	184	in property	38
Fidelity insurance		incontestable policies	59
nature	16	life tenant	44
terms	323	parent and child	59
Fire insurance		partners	60
assignment	389	stockholder	41
beneficiaries	336	relationship	53
insurable interest	38	uncle and nephew	53
nature	1	Insurance, nature of	1
subrogation	536	Interest, change of	157
terms	142	Interstate commerce, insurance as	39
Foreclosure proceedings	176	Intoxicants	295
Forfeiture, waiver of	417, 444	Iron-safe clause	192
<i>See also</i> NON-FORFEITURE CLAUSE.			
Form of contract	76	Judgment, as incumbrance	158
Formation of contract	22		
Frauds, statute of	79	Lessor and lessee, subrogation	560
		Liability fixed, when	314
Gas, death by	290	Lienholder, subrogation	566
General agents	510	Life insurance	
General average	232	assignment	402
Guaranty insurance		beneficiaries	359
nature	16	nature of	7
terms	323	subrogation	585
		terms	270
Hazard, increase of	142	Life tenant, insurable interest	44
Health	249	Lightning, loss by	184
Heredity	255	Limitation of time to sue	211
Husband, insurable interest in property of wife	46	Limits of contract	336
		Local agents	468
		Location of property	170, 176
Illegal insurance	126		
<i>See also</i> VIOLATING LAW.		Magistrate's certificate	188
Implied terms	79	Manufactory, operation of	172
Incontestability	59, 264	Marine insurance	
Increase of hazard	142	assignment	401
Incumbrances	158	nature of	5
		terms	217

	PAGE.		PAGE.
Mechanic's lien, as incumbrance	160	Promissory representations	118, 442
Medical attendant	254	Proof, <i>See</i> BURDEN OF PROOF.	
Memorandum clause	241	Proofs of loss	185
Misrepresentation, <i>See</i> REPRESENTATIONS.		waiver	459, 463, 501
Mistake	126	Pro-rating	198
Mortgage, as alienation	155	Proximate cause	
Mortgagor and mortgagee		accident insurance	282
insurance for	349	fire insurance	178
subrogation	566	marine insurance	231
Mutual benefit insurance		Reality of consent	104
beneficiaries	381	Re-building by insurer	203
nature of	13	Re-insurance	71
terms	318	Relationship, insurable interest	53
Nature of insurance	1	Remedies for insurer's breach	410
Negligence, fire by	181	Removal for safety, loss by	184
Nephew and uncle, insurable interest	53	Representations and warranties	108
Niece and aunt, insurable interest	56	burden of proof	124
Non-forfeiture clause	268	effect of misrepresentation	123
Non-occupancy, <i>See</i> OCCUPANCY.		promissory representations	118
Notary's certificate	188	statutes	120
Occupancy	165	Residence and travel	256
Occupation, life and accident insurance	299	Retaliatory legislation	39
Oral contract	76	Risk, increase of	142
Oral waiver	512	Safe clause	172
Other insurance		Seaworthiness	221
fire	146	Soliciting agent	479
life	108	Standard policy	
Over-exertion	294	construction	133
Over-valuation	150	oral waiver	518
Ownership	152	terms implied in oral contract	81
Parent and child, insurable interest	59	State control of insurance	31
Parol evidence rule and waiver	424, 437	Statute of frauds	79
<i>See also</i> PROMISSORY REPRESENTATIONS.		Statutes	
Particular average	241	agents	531
Parties to the contract	22	incontestability	268
<i>See also</i> LIMITS OF CONTRACT.		non-forfeiture	269
Partner, insurable interest in life	60	representations and warranties	120
Physician	254	valued policies	209
Poison, death by	287	Stockholder, insurable interest	41
Premiums	135	Sub-agents	503
waiver of	492	Subrogation	536
Premium notes	140	accident insurance	585
Prohibited articles	162	carriers	553
		fire insurance	536
		lessor and lessee	560
		lienholder	566
		life insurance	585
		mortgagor and mortgagee	566
		party plaintiff	581

	PAGE.		PAGE.
Subrogation, <i>continued</i> .		Violating law, death or accident	
tort	550	while	301
vendor and vendee	536	Valued policies	207
Sue and labor clause	245	Vendor and vendee	
Suicide, death by	258	as owners	152
as violation of law	306	insurance for	344
		subrogation	536
Termination of marine risk	219	Void or voidable for forfeiture	419
Terms of insurance contract	135	Voluntary exposure	284
accident insurance	270	Waiver and estoppel	417
fidelity and guaranty insurance	323	after forfeiture	444
implied	79	after policy issued but before	
life insurance	248	forfeiture	443
marine insurance	217	before policy issued	423
mutual benefit insurance	318	consideration for	422, 445, 454
Title, change of		oral	512
See ALIENATION, INCUMBRANCE.		parol evidence rule	424, 437
Title guaranty insurance	329	when question for jury	463
Tort, subrogation	550	what constitutes	420, 421, 459
Total disability	310	Waiver of proofs of loss	463
Total loss	236	Warranties, <i>see</i> REPRESENTATIONS	
Travel	256	AND WARRANTIES.	
		Wife, life insurance for	375
Uncle and nephew, insurable interest		Written contract	76
	53	Wrongdoer, subrogation	550

UC SOUTHERN REGIONAL LIBRARY FACILITY

AA 000 819 206 4